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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-723

UNITED STATES *ex rel.* JOSEPH A. TRIANO,

Petitioner,

vs.

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY, HUDSON COUNTY COURT, LAW DIVISION, and JAMES T. O'HALLORAN, Prosecutor of Hudson County,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Petitioner, Joseph A. Triano, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit denying petitioner's petition for the granting of a Writ of Habeas Corpus dated and entered on October 17th, 1975.

Opinions Below

The opinion of the United States Court for the District of New Jersey appears in the appendix hereto. No written opinion was rendered by the Court of Appeals.

Jurisdiction

The judgment of the Court of Appeals was entered on October 17th, 1975. This court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. 1254 (1).

Questions Presented

Whether the doctrine of collateral estoppel as embodied in the double jeopardy provision of the Fifth Amendment, bars the retrial of any issue resolved in a prior trial?

Constitutional Provision

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fifth Amendment to the Constitution

U.S.C.A. Amends 5.

Statutory Provisions Involved

BRIBERY AND CORRUPTION

2A:93-6. Giving or accepting bribes in connection with government work, service, etc.

> "Any person who directly or indirectly gives or receives, offers to give or receive, or promises to give or receive any money, real estate, service or thing of value as a bribe, present or reward to obtain, secure or procure any work, service, license, permission, approval or disapproval, or any other act or thing connected with or appertaining to any office or department of the government of the state or of any county, municipality or other political subdivision thereof, or of any public authority, is guilty of a misdemeanor."

2A:105-1. Unlawful takings.

> "Any judge, magistrate or public officer who, by color of his office, receives or takes any fee or reward not allowed by law for performing his duties, is guilty of a misdeameanor."

2A:85-1. Offenses indictable at common law and not otherwise covered, punishable as misdemeanors.

> "Assaults, batteries, false imprisonments, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offenses of an indictable nature at common law, and not otherwise expressly provided for by statute, are misdemeanors."

39:4-50. Operating under influence of liquor or drugs; penalty, forfeiture of right to operate.

> "(a) A person who operated a motor vehicle while under the influence of intoxicating liquor, nar-

cotic, hallucinogenic or habit-producing drugs, or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him, or in his custody or control, shall be subject, for the first offense, to a fine of not less than $200.00 nor more than $500.00, or imprisonment for a term of not less than 30 days nor more than 3 months or both, in the discretion of the magistrate, and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of 2 years from the date of his conviction or until he reaches the age of 21 years, whichever is the greater period of time, in the case of a person who at the time of his conviction is under the age of 21 years. Except as hereinafter provided, for a subsequent violation, he shall be imprisoned for a term of 3 months and shall forfeit his right to operate a motor vehicle over the highways of this State for a period of 10 years from the date of his conviction, and, after the expiration of said period, he may make application to the Director of the Division of Motor Vehicles for a license to operate a motor vehicle, which application may be granted at the discretion of the director. A magistrate who imposes a term of imprisonment under this section may sentence the person so convicted either to the county jail or to the workhouse of the county wherein the offense was committed.

A person who has been convicted of a previous violation of this section need not be charged as a second offender in the complaint made against him in order to render him liable to the punishment imposed by this section on a second offender, but

if the second offense occurs 10 or more years after the previous conviction the court may, in its discretion, suspend the sentence of imprisonment, impose a fine of not less than $300.00 nor more than $1,000.00 and place the person on probation.

(b) A person who operates a motor vehicle while his ability to operate such motor vehicle is impaired by the consumption of alcohol shall be subject, for a first offense, to a fine of not less than $50.00 nor more than $100.00 and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of 6 months from the date of his conviction. For a subsequent violation, he shall be fined not less than $100.00 nor more than $300.00 and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of 2 years from the date of his conviction. After the expiration of said period of forfeiture, he may make application to the Director of Motor Vehicles for a license to operate a motor vehicle which application may be granted at the discretion of the director."

Statement of the Case

On December 2nd, 1971, a Hudson County Grand Jury returned Indictment 326-71 which charged the petitioner, Joseph Triano, the Deputy Clerk of the Hudson County District Court, with bribery, contrary to N.J.S. 2A:93-6 (Count 1), unlawful taking in violation of N.J.S. 2A:105-1 (County 2) and misconduct in office, contrary to N.J.S. 2A:85-1 (Count 3).

A three count indictment was returned against Joseph Triano, Deputy Clerk of the Criminal Division of the Hud-

son County District Court. The First Count alleged that Joseph Triano committed bribery by accepting one hundred dollars from Abraham Chasnoff. It was alleged that the one hundred dollars was given because Joseph Triano represented that he could obtain a certain disposition of those charges pending against a James Cairns, a client of Abraham Chasnoff. The Second Count of the indictment alleges that the receipt of the one hundred dollars constituted the crime of extortion. The Third Count of the indictment alleged that Joseph Triano committed three specific acts of misconduct in office, by representing that he would obtain a favorable disposition of the charges against James Cairns; by amending the summons of James Cairns; and by accepting the $100.00. As is evident, the first and third acts of misconduct are based upon the same facts as the first and second counts in the indictment; that is, bribery and extortion.

During the trial, Abraham Chasnoff an attorney testified that a James Cairns had been referred to him through the office of another attorney in Kearny (1T 2-4 to 23). James Cairns had been charged with drunk driving and failure to obey the signal of an officer (1T 6-24 to 1T 7-11). According to Chasnoff, on June 25th, he received a message that Joseph Triano had called. On June 28th, Joseph Triano called again (1T 14-8 to 12). Chasnoff testified that Joseph Triano, who was the Deputy Clerk of the Hudson County District Court, Criminal Division, told him that the case had been scheduled for a later date because the officers were mad at his client, and were reluctant to downgrade it. Prior to this telephone call, Abraham Chasnoff had never met or spoken to Joseph Triano.

On November 5th, according to Abraham Chasnoff, he met in Joseph Triano's office where Joseph Triano allegedly told him that he had been able to convince the officers to downgrade the case from "a" to "b" and that

Abraham Chasnoff would have to "bag" them $50. apiece (1T 25-24 to 1T 26-1). Chasnoff claimed he did not know what the word "bag" meant (1T26-2 to 3). The money for the officers was supposed to be given to Joseph Triano in an envelope (1T 27-2 to 19). At the time of this alleged conversation there were five to seven other persons present in the room (3T 1-5). No attempt was made to call these persons as witnesses.

On November 15th, Abraham Chasnoff went to the office of the Prosecutor's investigators and telephoned Joseph Triano. Attached to the telephone was a recording device that had been installed by the investigators (1T 42-1 to 21; 5T 14-4). On November 24th, Abraham Chasnoff went to the Administration Building where the investigators fitted him with a concealed recording device (1T 50-2 to 25). Chasnoff was also given an envelope with a hundred dollar bill in it (1T 52-10). Detective Flannery had initialled the hundred dollar bill and recorded its serial number (5T 10-14).

Abraham Chasnoff then went to Joseph Triano's office. Joseph Triano told him that everything was straightened out and he was going to speak to Judge McCole in chambers, and the offense was going to be handled as a "b" offense (1T 58-1 to 16). In addition the offense of failure to stop for an officer's signal was to be merged with the other offense (1T 59-19). Joseph Triano allegedly told Chasnoff that the judge would accept the plea without the officers being present (1T 60-17 to 18). According to Chasnoff, Triano said he would see the judge to decide if he wanted to take the matter in chambers (4T 108-19 to 23). Joseph Triano also allegedly said he would tell the judge what the fine would be (4T 113 to 187). Abraham Chasnoff then gave the envelope to Joseph Triano who held it up to the light, folded it twice and put it in the top left hand drawer of the safe (1T 63-9 to 1T64-5).

During all this time there were possibly twelve other persons in the room (4T 60-22 to 23).

Judge McCole of the Hudson County District Court was the judge who was handling the traffic calendar on November 24th. He was called as a defense witness. He presented a procedure that was quite contrasting to that depicted in the alleged conversation between Chasnoff and Joseph Triano. He testified that prior to November 24th, 1971 he had no knowledge concerning the case of *State* v. *James Carins* (11T 52-14 to 18). He testified that he never spoke to anyone about downgrading the summons relating to James Cairns (11T 55-2 to 6). Judge McCole described how downgrading only occurs after a consultation between the prosecutor and the person charged with the offense, and then the Court must agree with the suggestion (11T 57-1 to 7). Judge McCole also said he would only dispose of the case in open Court (11T 58-6). Judge McCole went on to state that there is no determination of what the fine would be until the defendant appears before the judge (11T 69-20 to 22). In addition the court indicated that he would never have disposed of these particular tickets unless the officers were present (11T 102-3 to 8). Judge McCole also stated that he would not have merged these two tickets (11T 58 to 11T 61-20).

Abraham Chasnoff testified that after giving the ticket to Joseph Triano he left his office and met Captain St. Pierre and Detective Flannery and told them were the envelope had been placed (1T 67-11). After placing Joseph Triano under arrest, Flannery went into the Violations Bureau safe in an attempt to find the white envelope, but was not able to locate it until he left the office and had another conversation with Abraham Chasnoff (5T 40-6 to 11). When he did find the envelope, it was in a file of other summons that had money attached to pay the assessed fines (5T 107-5 to 9).

Patrolman Norman Sierfeld of the Hudson County Police Department was called by the State. He testified that on June 1, 1971, he arrested James Cairns for driving while under the influence of intoxicating liquors (8T 7-23 to 27; 11T 8-12 to 11T 9-9). This was in addition to the summons for failing to obey the officers signal. Patrolman Sierfeld testified that two copies of the summons that he issued on that date had been altered (11T 14-6 to 9). These two copies had a "b" added after the statutory violation (11T 14-20 to 22). The patrolman testified that from the date he issued the summons until the date that Joseph Triano was arrested, he never saw the summonses (11T 14-20 to 11T 20-1). The patrolman indicated that lowering the charge from "a" to "b" was commonly done and he believed that he had the authority to lower it (11T 37-8 to 11).

Orway Hilton, a handwriting specialist was called as an expert witness by the State (9T 84-9 to 25). He examined the handwriting samples of the defendant Joseph Triano as well as the summons that were the subject matter of this criminal prosecution and he performed various scientific tests (9T 90-2 to 9T 92-11). This expert witness said he was unable to identify the "b" as having been written by Joseph Triano (9T 94-10 to 13). Mr. Hilton was also unable to say that Officer Sierfeld did not put the "b" on the copies of the summons (9T 113-16 to 18).

Margaret Prendergast, the principal clerk of the Hudson County District Court prior to November 24th, 1971, and presently the Acting Deputy Clerk of the District Court, testified about the procedure of that court.

She testified that the safe where the police found the envelope was opened at the beginning of the business day at about a quarter to nine. Three people could open the safe and it then remained open all day (9T 22-1 to 9).

At the time of the arrest of Joseph Triano, fourteen persons were working in that room (9T 23-21). Captain Edmund L. Burke, Inspector of the Hudson County Police Department testified on behalf of the State about the procedure employed by that police department. During the trial numerous character witnesses were called on behalf of Joseph Triano and the jury listened to the taped conversations.

After weighing the testimony the jury concluded (1) that the state had not proved that Joseph Triano had represented that he would obtain a certain disposition of the case of James Cairns and (2) that Joseph Triano did not receive the $100 as a bribe. Consequently, the jury found Joseph Triano not guilty of bribery and extortion. The jury did not reach a verdict on the charge of misconduct.

The petitioner, thereafter applied to the Superior Court of New Jersey, Law Division, for an order dismissing the third Count of the indictment charging misconduct in office on grounds of double jeopardy, *res judicata* and collateral estoppel. The trial court on January 22nd, 1973, granted the motion applying the principle of collateral estoppel. At the time of the argument on the motion to dismiss the third count of the indictment before Judge Young, the Assistant Prosecutor candidly admitted that the evidence which would be addressed to the trial court at a second trial, would be "substantially the same" and that no new evidence would be introduced. A conforming judgment of dismissal (dismissing Count 3 of Indictment 326-71) was entered and the State appealed.

On February 21st, 1974, the Appellate Division reversed the dismissal and ordered a plenary trial. Petitioner then appealed the decision of the Appellate Division and petitioned for certification to the Supreme Court

of New Jersey. Both were denied on April 30th, 1974. Petitioner then petitioned the Supreme Court of the United States for certiorari, which was denied on October 15th, 1974, even though Mr. Justice Brennan and Mr. Justice Stewart would have granted certiorari.

On January 21st, 1975, a petition was filed for a Writ of Habeas Corpus in the United States District Court.

Jurisdiction in the Federal District Court of New Jersey was pursuant to 28 U.S.C. 2241 (a) and (c)(3) and 28 U.S.C. 2254. Petitioner is released on his own recognizance pending retrial of Count 3 of Indictment No. 326-71 in Superior Court of New Jersey, Hudson County. Petitioner, released on his own recognizance is "in custody" within the meaning of 28 U.S.C. 2241. *Hensley* v. *Municipal Court,* 411 U.S. 344 (1973). Petitioner has also exhausted his state court remedies.

On January 23rd, 1975, the Honorable Herbert Stern entered an order (1) staying all proceedings in the Superior Court in the matter of *State of New Jersey* v. *Joseph A. Triano,* Indictment No. 326-71, pursuant to 28 U.S.C. 2251; (2) issuing a Writ of Habeas Corpus ad Testificandum removing all restraints on petitioner pending the Court's disposition of the petition, and (3) enjoining the Hudson County Prosecutor and his staff from proceeding with the prosecution of petitioner pending disposition by the United States District Court. On May 6th, 1975, Judge Stern issued an opinion and order which dismissed the petition for a Writ of Habeas Corpus and vacated the order of Court dated January 23rd, 1975. Judge Stern found that jurisdiction existed in the Federal Court to decide the case on the merits and that the jurisdiction should be exercised. By letter dated May 7th, 1975, Judge Joseph Thuring, J.S.C. informed the petitioner's attorney that this action, *State* v. *Triano,* had

been set down for trial on June 16th, 1975, at 9:00 A.M. On May 13th, 1975, a Notice of Appeal was filed with the Clerk of the United States District Court in Newark. On May 15th, 1975, on motion of the petitioner, Judge Stern granted a certificate of probable cause to appeal to the Third Circuit in this matter pursuant to 28 U.S.C. 2253 and denied petitioner's application for a continuation of the restraints imposed on the State Court. On June 3rd, 1975, the Third Circuit Court of Appeals granted petitioner's motion for an order reimposing the restraint imposed by Honorable Herbert J. Stern, staying all proceedings pending in the Superior Court of New Jersey, in connection with Indictment No. 326-71, pending the outcome of this appeal.

On October 17th, 1975, the United States Court of Appeals for the Third Circuit issued an order affirming the judgment of the district court.

Reasons for Granting the Writ

The Court of Appeals has rendered a decision in conflict with the applicable decisions of this Court and in conflict with the decisions of Courts of Appeals on the same matter.

In *United States ex rel. James W. Rogers* v. *J. Edwin La Valle,* 517 F.2d 1330 (2nd Cir. 1975), the Second Circuit granted the Writ of Habeas Corpus and rendered a decision regarding collateral estoppel which is in conflict with the decision of the Third Circuit. That court faced the issue, whether representation after a mistrial following a hung jury is permissible, when inconsistency but pursuant to an inconsistent charge, there has been an acquittal on an earlier count of an element that is necessary to the later conviction? The court held it was not permissible.

The District Court for the Northern District of New York stated that "viewing the verdict herein as an entity and as a whole, I cannot find that the jury herein necessarily acquitted petitioner of kidnapping in the second degree."

The Second Circuit in rejecting this contention stated at page 1334:

> "In fact, however, the jury did just that, however erroneously and no matter how confused. The verdict was an express acquittal of kidnapping in the second degree. It was rendered without objection to the inconsistency by the prosecution. Under *Ashe* v. *Swenson,* 397 U.S. 436, 445, where it appears that the jury's verdict in the prior trial necessarily decided the issues raised in the second prosecution, collaterial estoppel, is constitutionally operative, embodied in the guarantee against double jeopardy . . ."

The Court also distinguished its previous decision in *United States* v. *Zane,* 495 F2d. 683, 690 (2nd Cir.) cert. denied, 419 U.S. 895, 95 S. Ct. 174 (1974), where it had ruled that inconsistent jury verdicts simultaneously rendered are the jury's prerogative. The Second Circuit stated that had the jury in state court brought in a verdict of not guilty of kidnapping in the second degree under Count Three, but guilty under Count Four, then one could then argue that the principle of the above cases governed.

The principle that even egregiously erroneous trial court action that resulted in a verdict of acquittal would constitute jeopardy so that the defendant could not be successfully prosecuted was firmly established in *Fong Foo* v. *United States,* 369 U.S. 141, 143, 82 S. Ct. 671 (1962); *United States* v. *Sisson,* 399 U.S. 267 (1970).

In the petition at bar as well as in *U. S. ex rel. Rogers* v. *La Valle, supra,* at p. 1333, the state Court was in error by virtue of its instruction to the jury. In both cases, the state by failing to object to the form of the verdict was equally at fault. In *State* v. *Triano,* Superior Court, Law Division, Indictment No. 326-71, the Court asked if there were any comments to the charge. The prosecutor repeated "no" (T10/18/72, 194-7).

It is quite clear that a question of fact or law distinctly put in issue and determined by a court of competent jurisdiction cannot afterwards be disputed. *Frank* v. *Mangum,* 237 U.S. 309 (1914).

In *Benton* v. *Maryland,* 395 U.S. 784, 89 S. Ct. 2056 23 L.Ed. 2d 707 (1969), this Court held that the double jeopardy provision of the Fifth Amendment is binding on the States, and in *Ashe* v. *Swenson,* 397 U.S. 436, 90 S. Ct. 1189, 24 L.Ed. 469 (1970), held that the doctrine of collateral estoppel was embodied in the Fifth Amendment guarantee against double jeopardy. This Court has ruled repeatedly "that after an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit. 397 U.S. at 443, 90 S. Ct. at 1194:

Thus:

> "Where a previous judgment of acquittal was based upon a general verdict . . . (The rule of collateral estoppel) requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matters, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. 397 U.S. at 444."

If the issues which the state wished to litigate have already been determined in the first trial, a subsequent trial is barred. In order to resolve this question, inquiry must be made into the issues which the first jury had to resolve in making its judgment. This requires a canvassing of the record of the first trial. *Sealfon* v. *United States,* 332 U.S. 575, 579 (1948); *State* v. *Cormier,* 46 N.J. 494, 507 (1966).

This Court in *Sealfon* v. *U.S.,* 332 U.S. 575 (1948) considered the effect of an acquittal on the charge of conspiring to defraud the United States Government. Sealfon's connection with the conspiracy depended on a *specific letter* admittedly sent by him. Thereafter, he and another of the former defendants were prosecuted and convicted for the substantive offense of publishing the fake invoices which had been the basis of the alleged conspiracy. As Sealfon was an aider and abettor, his connection with the substantive offense turned on whether this letter was sent pursuant to an agreement with the other defendant.

The Court found that the facts which were crucial to the prosecutor's case were necessarily adjudicated in the first to be non-existent. *A second attempt to prove the agreement which at trial was crucial to the prosecutor's case is something he may not do.*

By analogy, the first trial produced verdicts of acquittal on counts of bribery and extortion in which the key evidence offered was a 'marked hundred dollar bill'. At the second trial on the sole count of misconduct, which essentially charges bribery and extortion, the prosecutor is prohibited from once again introducing the similar evidence offered at the first trial.

Following *Sealfon,* supra, the Fifth Circuit in *Yawn* v. *U. S.,* 244 F.2d 235 (5th Cir. 1957) was presented with a

similar set of facts. The defendant in *Yawn,* supra, was first acquitted of a substantive offense, the possession of a still. An indictment was brought one week later in which possession of the same still at the same time was alleged *as one specific act of the conspiracy.* The Court held that the question of the possession of the still had already been litigated.

In *U. S.* v. *DeAngelo,* 138 F2d 466 (3rd Cir. 1943), the defendant and two others were jointly indicted for having robbed two bank messengers. At the same time they were indicted for having conspired to commit the robbery, which they were accused in the first mentioned indictment. Defendant was acquitted of the robbery and upon the trial of the conspiracy indictment. He proposed to prove that the former verdict of acquittal and that the material issues at the robbery trial, as to his alleged presence and participation, were the same issues as the first trial. Defendant also argued that the allegations and *offenses of proof would be identical at the second trial.*

The Court stated than an accused is constitutionally entitled to a trial de novo of the facts alleged and offered in support of each offense charged against him and to a jury's independent finding with respect thereto. The Court in citing *Sealfon,* supra, stated that he has a further right under a recognized rule of evidence, to claim finality with respect to facts determined in his favor upon a previous trial.

In *Green* v. *U. S.,* 426 F.2d 661 (D.C. Cir. 1970), the circuit court held that where the trial judge in a prior trial at the time of granting of the mistrial as to various offenses relating to robbery directed a verdict of acquittal on a count charging unauthorized use of a vehicle, the admission into evidence in a subsequent trial as to theft of the car and its use which was the subject of the count to which defendants had been acquitted was error.

In *Mahoney* v. *U.S.*, 420 F.2d 253 (D.C. Cir. 1969), the Circuit Court of Appeals stated that when a question of fact essential to judgment is litigated and determined in a criminal prosecution, the determination is conclusive between parties in any subsequent prosection, although offenses be different. The Court determined at page 255, that the Court of General Sessions ruling that the appellant was not the operator of a motor vehicle in question barred subsequent prosecution for the unauthorized use of the vehicle.

In *United States* v. *Flowers*, 255 F.Supp. 485 (E.D.N.C. 1966), the jury found the defendant not guilty of thirteen counts of the indictment and could not agree on thirteen other counts. The Court held at p. 489:

> "I conclude on the basis of the available authority that the defense of collateral estoppel *as to any facts which were necessarily determined in the defendant's favor by the verdict on the counts determined by the first trial* (emphasis added), is open to the defendant upon a retrial on the counts which the jury failed to agree."

In *Cosgrove* v. *United States*, 224 F.2d 146 (9th Cir. 1954) the jury found the defendant Cosgrove not guilty of two counts of the indictment and disagreed on the three remaining counts. The Court held that the issues were not nearly identical that the doctrine of collateral estoppel applied. In *Oliver* v. *Superior Courts*, 267 P. 764 (Dist. Ct. Cal. 1928), the jury acquitted the defendant of thirty-three counts of the indictment and could not agree on the remaining count. The court reviewed the evidence and dismissed the remaining count. It found that in order to obtain a conviction on that count, the state would have to prove some of the facts that have

been alleged in the counts which the jury acquitted the defendant. In accord, *People* v. *Beltran,* 210 P.2d 238, 243 (Dist. Ct. App. Cal. 1949). Collateral estoppel was also applied in a similar manner in the cases of *United States* v. *Armco Steel Corp.,* 252 F. Supp. 364 (S.D. Cal. 1966) and *United States* v. *Simon,* 225 F.2d 260 (3rd Cir. 1955).

The State of New Jersey in its brief before the Federal District Court relied on the earlier New Jersey case of *State* v. *Roller,* 29 N.J. 339 (1959). *State* v. *Roller,* supra, p. 345, relied upon the case of *State* v. *Hoag,* 21 N.J. 496 (1956), aff'd 356 U.S. 464 (1957). *State* v. *Hoag,* supra, had been discredited by the United States Supreme Court in *Benton* v. *Maryland,* supra and *Ashe* v. *Swenson,* supra.

The petitioner also relies on the New Jersey Supreme Court's decision in *State* v. *Cormier,* 46 N.J. 494 (1966), in which the Court held per Justice Jacobs, that where evidence on a subsequent trial was substantially the same as that introduced during the conspiracy trial, the state, could not try the precedent again. While the thrust of the case was directed at the state's desire for a retrial, the court's reasoning at page 509 is applicable to the case at bar:

> The doctrine of collateral estoppel *should not be applied grudgingly.* The State's resources are sufficient to enable it to prepare and present its case thoroughly. It did not during the first trial. The fact that it then failed to persuade the jury that the loans were made on the basis of false and fictitious invoices rather than bona fide purchase orders *was no reason for allowing it to try again.* The broadening policy considerations in favor of

> safeguarding individual rights of defendants and the need for conserving public energies as well as public funds, strongly suggest that where, as here, a *jury has considered and rejected the State's contention in favor of the defendant's contention on the issue submitted as the crucial one, the matter should be permitted to rest in its entirety.* (emphasis added).

The mere reading of the allegations manifests the striking similarities between those counts of the indictment on which the jury returned a verdict of not guilty and the third count of the indictment. The first count alleges that the defendant did receive the sum of $100.00 in cash as a bribe, present or reward from Abraham J. Chasnoff, which bribe was accepted pursuant to defendant's undertaking and representation made to said Chasnoff, that by reason of said public office, would obtain a certain disposition of charges then pending in the Hudson County District Court against one, James M. Cairns.

Comparing the misconduct count which the state seeks to offer identical evidence, the very first act alleges the undertaking by the defendant to effect the disposition of the charges against the same James M. Cairns by means of the payment by cash monies supplied by the same Abraham Chasnoff.

The second count of the indictment on which the jury also found Joseph Triano not guilty, charged that he had unlawfully and by color of his office as Deputy Clerk, did receive from Abraham Chasnoff a fee and reward in the approximate amount of One Hundred Dollars in cash, the same not allowed by law for performing his duties.

In striking similarity to the second count, the third alleged act of misconduct charges against the defendant,

as Deputy Clerk of the Criminal Division of the District Court ". . . did accept and receive the sum of One Hundred Dollars ($100.00) in cash from Abraham Chasnoff . . . in exchange for the taking of defendant Triano to influence and control the disposition of said criminal action in a manner favorable to James M. Cairns as aforesaid."

As Judge Young noted:

> "The parallel of the terms of the alleged third specific act of misconduct with the terms of the charge pertaining to unlawful taking clearly established an identity of issue comprising the *same* or *similar facts* (emphasis added) which makes up both accusations."

Analytically the identity of issues between what the jury had already decided and what the state seeks to relitigate can be demonstrated by reviewing the evidence presented at the trial.

The jury heard four days of testimony from Chasnoff concerning the corrupt bargain as alleged (1T 1 to 4T). It also heard testimony from the Prosecutor's staff, concerning the monitoring electronically of conversations between the defendant and Chasnoff arranging the alleged illegal undertaking and the consummation of same (5T 14-4). Moreover, the Jury heard relevant portions of two tape recordings of the conversations which had been monitored. There was also received into evidence a one hundred dollar bill, accompanied by testimony that the bill had been marked. There was testimony that the marked bill had been supplied to Chasnoff, who gave it to the defendant. The bill was then retrieved from a safe located near the defendant's desk in his office (5T

10-14; 5T 107-5 to 9). This is the same evidence that the state used to prove the first and third acts of misconduct.

A further analysis of the second alleged act of misconduct demonstrates that it is encompassed by the two counts of the indictment. This alleged act of misconduct asserts that Joseph Triano unlawfully and improperly amended and changed the summons from the charge of driving an auto while under the influence of alcohol N.J. S.A. 39:4-50 (a) to the lesser offense of driving while impaired N.J.S.A. 39:4-50 (b). Judge Young correctly noted:

> "The corrupt bargain which constituted the state's case on the bribery count centered around the alleged undertaking on the part of the defendant to obtain a certain disposition of certain charges in the Hudson County District Court against one, James Cairns . . . Likewise, the unlawful taking charge in the second count was tried in the context of 'a criminal action pending before the Criminal Division of the Hudson County District Court' in the words of that Count. The charges and the criminal action have references to a Summons No. CA52000 which charged driving while intoxicated, N.J.S.A. 39:4-50 issued to James Cairns."

The evidence produced by the state to establish the guilt of the defendant on the bribery and extortion charges involved the amendment of the ticket. Norman Sierfeld who issued the ticket denied seeing it from the date it was issued until Joseph Triano was arrested (11T 14-20 to 11T 20-1). Margaret Prendergast formerly the principal clerk of the District Court testified about the procedure relating to the processing, docketing and con-

trolling summons (9T 9-11 to 9T 16-24). Ordway Hilton, a handwriting expert testified; he was unable to state the "b" was written by the defendant (9T 94-10 to 13). He also testified that from his analysis he was unable to either exclude Officer Sierfeld or the defendant from being the person who had written the "b" (9T 113-16 to 18). Judge McCole testified that the Deputy Clerk did not have authority to alter a traffic summons (11T 57-1 to 7), and that he had not approved of the amendment to the ticket in question (11T 52-15). Judge Young then concluded:

> "A content analysis of the evidence adduced by the State, both quantitatively and otherwise, directed to the counts of bribery and unlawful takings, distinctly put in issue the allegations that defendant Triano unlawfully and improperly amended the summons. Indeed, it could be said that the unlawful tampering of the summons and the alleged unlawful manner in which the summons was processed by the defendant, constituted the core of the State's case. The accusatory act of tampering with the summons formed an integral part and necessary ingredient of the offense charged, and supplied a quid pro quo of the alleged bribe and extortion. On those charges the defendant was exonerated."

Where the "fact prosecuted" is the same in several counts of an indictment, though the offenses differ in coloring and degree, and the defendant is acquitted as to one or more counts, there is prior jeopardy. So it is that collateral estoppel does not require an identity of offenses, associated with the classic definition of double jeopardy, but rather a congruence of "facts prosecuted".

State v. *Leo Proulx,* 263 A2d 673, 675, (S. Ct. N.H. 1970).

In considering the scope of review where collateral estoppel is involved this court in *Sealfon,* supra, at p. 579, noted that: "The instructions under which the verdict was rendered, however must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings."

The issue posed before this Court raises serious constitutional questions regarding the State's ability to retry issues decided in a prior trial. The petitioner having been acquitted at a first trial is entitled to a judicial determination as to what facts and issues were decided there and what issues the State would be allowed to retry. Where a jury has considered and rejected the State's contention in favor of the defendant's contention on the issue submitted as a crucial one the matter should be permitted to rest in its entirety.

It is quite clear from the judicial construction of the Double Jeopardy Clause that the evil against which the clause protects a defendant is not a *second conviction* or a second punishment for the same crime. Rather, the provision protects an individual against the second trial itself. *Ashe* v. *Swenson,* supra.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Court of Appeals for the Third Circuit.

MILLER, HOCHMAN, MEYERSON & SCHAEFFER
Attorneys for Petitioner
By: LEONARD MEYERSON
A Member of the Firm

APPENDIX A

Indictment No. 326-71

SUPERIOR COURT OF NEW JERSEY

HUDSON COUNTY—LAW DIVISION
(Criminal)

A.D. 1971 Term
2nd Session 3rd Panel (Special)

STATE OF NEW JERSEY,

v.

JOSEPH A. TRIANO

Defendant

The Grand Jurors of the State of New Jersey, for the County of Hudson, upon their oaths, Present That

JOSEPH A. TRIANO,

while Deputy Clerk of the Criminal Division of the District Court of Hudson County, a public office under the authority of State of New Jersey and County of Hudson, on or about November 24, 1971, in the City of Jersey City, in the County of Hudson and State of New Jersey and within the jurisdiction of this court, did willfully,

knowingly, unlawfully and corruptly receive approximately One Hundred Dollars ($100.00) in cash as a bribe, present or reward from Abraham J. Chasnoff, an attorney-at-law of the State of New Jersey, which bribe was accepted pursuant to defendant's undertaking and representation, made to said Abraham J. Chasnoff, that defendant, by reason of his said public office, would obtain a certain disposition of certain charges then pending in the Hudson County District Court against one James M. Cairns, a client of Abraham J. Chasnoff, contrary to the provisions of N.J.S. 2A:93-6, against the peace of this State, the Government and dignity of the same.

SECOND COUNT:

And further Present, That on or about November 24, 1971, in the place and in the jurisdiction set forth in the First Count hereof, Joseph A. Triano, while holding the said public office of Deputy Clerk of the Criminal Division of the Hudson County District Court, willfully, knowingly, unlawfully and by color of his office as said Deputy Clerk did receive and take from Abraham J. Chasnoff, an attorney-at-law of the State of New Jersey, who was then and there representing a person, one James M. Cairns, in a criminal action pending before the Criminal Division of the Hudson County District Court, a fee and reward in the amount of approximately One Hundred Dollars ($100.00) in cash, the same not allowed by law to the said Joseph A. Triano for performing his duties as Deputy Clerk of the Criminal Division of the Hudson County District Court contrary to the provisions of N.J.S. 2A:105-1, against the peace of this State, the Government and dignity of the same.

Appendix A

THIRD COUNT:

And further Present, That during the period, approximately, between November 5, 1971, and November 24, 1971, in the place and in the jurisdiction set forth in the First Count hereof, Joseph A. Triano, willfully, maliciously and corruptly violated his duty to the people, to faithfully, impartially, fairly and justly treat, manage, and process all criminal complaints and summonses in the Hudson County District Court, in exercising the duties of the public office of Deputy Clerk of the Criminal Division of the Hudson County District Court, and did misperform and misconduct duties of his said office, as the same related to the case of State of New Jersey vs. James M. Cairns, an action then and there pending in the Hudson County District Court, by undertaking to process, dispose of, and deal with said case in an unfair, partial, and unjust manner, by committing the following respective acts of misconduct:

1. Defendant Triano did represent and state to said Abraham J. Chasnoff, in connection with the said criminal action pending against James H. Cairns, that defendant Triano would obtain the consent of the two police officers who initiated the said criminal action to a disposition of said criminal action favorable to James H. Cairns, by means of payment of cash monies (to be supplied by Abraham J. Chasnoff to defendant Triano) to said police officers;

   Defendant Triano did, in connection with said criminal action against James H. Cairns, unlawfully and improperly amend and change Summons

Appendix A

No. CA52000 of the Hudson County District Court in the following manner: The Summons, as filed, alleged that James M. Cairns violated the provisions of N.J.S. 39:4-50; defendant Triano unlawfully, and without authority, did amend said Summons to allege a violation of a lesser offense, N.J.S. 39:4-50-B;

Defendant Triano did accept and receive the sum of One Hundred Dollars ($100.00) in cash from one Abraham J. Chasnoff, a New Jersey attorney, then and there representing said James M. Cairns, in exchange for the undertaking of defendant Triano to influence and control the disposition of said criminal action in a manner favorable to James M. Cairns as aforesaid;

and being contrary to the provisions of N.J.S. 2A:85-1, against the peace of this State, the Government and dignity of the same.

GEOFFREY GAULKIN
Prosecutor by Direction

APPENDIX B

Decision of Judge Young, Superior Court of New Jersey, Law Division Hudson County (Criminal)

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY—LAW DIVISION

Indictment No. 326-71

STATE OF NEW JERSEY,

vs.

JOSEPH A. TRIANO

Defendant

Argued December 22, 1972. Decided January 22, 1973.

Miller, Hochman, Meyerson & Miller, attorneys for the Defendant, Leonard Meyerson, appearing.

Honorable Geoffrey Gaulkin, Prosecutor for the County of Hudson, for the State of New Jersey, Norman Kline, Assistant, appearing.

YOUNG, J.S.C. t/a

On October 20, 1972, following a trial of three weeks, the Jury reported verdicts of acquittal on the First Count of the Indictment which charges bribery, N.J.S.A. 2A: 93-6, and on the second Count which charges unlawful

takings of a fee or reward, N.J.S.A. 2A:105-1. The Jury reported a disagreement on the Third Count which charges three specific acts of misconduct in office, N.J.S.A. 2A:85-1. A declaration of mistrial was made as to that Count. Defendant now pleads the doctrines of double jeopardy, *res judicata*, and collateral estoppel in his motion for an order dismissing the Third Count.

The motion invokes aspects of constitutional law, Federal and State, the principles of double jeopardy, *res judicata* and collateral estoppel; decisional law, Federal and State; as well as the application of the total body of this jurisprudence to the record compiled over which this court presided.

The area of double jeopardy and *res judicata* has not only been the subject of extensive legal bibliography, but in the words of Mr. Justice Proctor, "the subject of a great deal of confusion in the criminal law." *State* v. *Bell*, 55 N.J. 239, 243 (1970); see Note, "Collateral Estoppel in Criminal Cases—A Supplement to the Double Jeopardy Protection," 21 *Rutgers L. Rev.* 274, 287-288 (1967) in which the author concludes his survey with the words, "However, decisions involving double jeopardy have been irreconcilable and generally confusing."; Note, "Statutory Implementation of Double Jeopardy Clauses: New Life For a Moribund Constitutional Guarantee," 65 *Yale L.J.* 339, 344 (1956) in which the author states a similar conclusion: ". . . [C]urrent court decisions in this area are hoplelessly irreconcilable."; Note, Lugar, "Criminal Law, Double Jeopardy and Res Judicata," 39 *Iowa L.Rev.* 317 (1954).

The confusion in applying these principles is attributable in part to the common law courts. At common law

and immediately following the adoption of the Constitution, "one criminal act or a series of acts in a single plan was likely to yield only one offense." Mayers and Yarbrough, *"Bis Vexari*: New Trials and Successive Prosecutions," 74 *Harv. L.Rev.* 1, 29 (1960). Moreover, the common law courts did not distinguish between the "legal theory of an offense and the underlying factual transaction." Note, 65 *Yale L.J., supra,* at 342, cited in Comment, "Constitutional Law—Double Jeopardy—Successive Prosecutions for a Single Transaction as a Violation of the Due Process Clause," 20 *Rutgers L.Rev.* 631, 638 (1965).

In more recent years, the doctrine of collateral estoppel has reached constitutional dimensions in its application. The most recent pronouncements of the United States Supreme Court interpreting and applying double jeopardy and collateral estoppel have been collated by Mr. Justice Mountain for a unanimous New Jersey Supreme Court in *State* v. *Ebron,* 61 N.J. 207 (1972), from which the passage which follows is drawn:

> "The Fifth Amendment of the Federal Constitution says, '. . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb,' while Article I, paragraph 11 of our State Constitution provides that '[n]o person shall, after acquittal, be tried for the same offense.' Despite the dissimilarity in the language of these provisions, they have come to be recognized as substantially coextensive in principle and scope. *State* v. *Farmer,* 47 N.J. 145, 168 (1966), *cert.* den. 386 U.S. 991, 87 S. Ct. 1305, 18 L.Ed. 2d 335 (1967); *State* v. *Williams,* 30 N.J. 105, 122 (1959). Fur-

thermore it is now settled that through the Fourteenth Amendment the double jeopardy provision of the Fifth Amendment is binding on the states, *Benton* v. *Maryland,* 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

In *Ashe* v. *Swenson,* 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970) the Supreme Court defined collateral estoppel as meaning simply 'that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' 397 U.S. at 443, 90 S. Ct. at 1194, 25 L.Ed. 2d at 475. It went on to hold, for the first time, that the rule of collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy. Thus a defendant urging collateral estoppel is now projecting an argument of constitutional dimension. Compare *State* v. *Cormier,* 46 N.J. 494, 505 (1966)." 61 N.J. at 214-215.

Among the distinctive principles of law declared by the United States Supreme Court in the cases cited by Mr. Justice Mountain are these: that collateral estoppel is now part of the constitutional protection against double jeopardy, and that in applying the principle of collateral estoppel, the "issue of ultimate fact" which has been determined by a valid judgment becomes the operative concept.

The guidelines of the scope of the inquiry were established by the Supreme Court in *Ashe* v. *Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469 (1970):

Appendix B

> "Where a previous judgment of acquittal was based upon a general verdict . . . [The rule of collateral estoppel] requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" 397 U.S. at 444, 90 S.Ct. at 1194, 25 L.Ed. 2d at 475-476, citing Mayers and Yarbrough, *supra,* 74 *Harv.L.Rev.* 1, 38-39.

Earlier, in the leading case of *Sealfon* v. *United States,* 332 U.S. 575, 579, 68 S.Ct. 237, 240, 92 L.Ed. 180, 184 (1947), the Supreme Court, in delineating the scope of the review when collateral estoppel is invoked noted that "The instructions under which the verdict was rendered, however, must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. We look to them only for such light as they shed on the issues determined by the verdict."

Accordingly, in disposing of the pending motion, the inquiry in canvassing the record and considering "all the circumstances of the proceedings" must be "issue" oriented, which in turn calls for the isolation of the constituent facts embraced within the issue. The Supreme Court of New Jersey in *State* v. *Ebron, supra,* 61 N.J. 207 (1972) endorsed both the frame of reference as well as the procedure here outlined, having earlier rejected strict adherence to the "same transaction" test, the "lesser included offense" and the "same evidence" test. See also *State* v. *Currie,* 41 N.J. 531, 539 (1964), in which the Court pointed out that in weighing double jeopardy: "The

primary considerations should be fairness and fulfillment of reasonable expectations in the light of the constitutional and common law goals."

Prior to *State* v. *Ebron, supra,* 61 N. J. 207 (1972), the judicial bench marks in this area of the law were carved by the Supreme Court in *State* v. *Hoag,* 21 N.J. 496 (1956), *aff'd. sub. nom. Hoag* v. *New Jersey,* 356 U.S. 464, 78 S. Ct. 829, 2 L.Ed. 2d 913 (1958), *reh. den.* 357 U.S. 933, 78 S. Ct. 1366, 2 L.Ed. 2d 1375 (1958). Hoag had been acquitted of the charge of armed robbery of three alleged victims named in three indictments which were consolidated for trial. A subsequent indictment charged Hoag with armed robbery at the same place on the same day, but named a fourth alleged victim. This time the jury returned a verdict of guilty. Hoag had interposed an alibi at the earlier trial which resulted in his acquittal. On appeal to the New Jersey Supreme Court, the plea of double jeopardy was rejected. The Court applied the "same evidence" test and concluded that the subsequent indictment did not charge "the same offence" as that term is used in Article I, paragraph 11 of the State Constitution for the reason that a different alleged victim was named. Additionally, Hoag's plea that the retrial "offends fundamental justice" did not avail him. Mr. Justice Heher filed a dissent, urging concepts which were later to receive the approbation of the Court. The essence of Mr. Justice Heher's opinion is set out in the sentence, "Where the 'fact prosecuted' is the same in both prosecutions, though the offenses differ in 'coloring and degree,' there is prior jeopardy." *State* v. *Hoag, supra,* 21 N.J. at 510, citing *State* v. *Cooper,* 13 N.J.L. 361 (Sup.Ct. 1883).

Appendix B

Criticism of the reasoning and conclusion in the *Hoag* case in *State* v. *Cormier,* 46 N.J. 494, 507-508 (1966), presaged a contrary result. Indeed, more recently a judgment has been entered in the *Hoag* case in the form of post-conviction relief granted by Judge Simpson. See *State of New Jersey* v. *William Hoag,* Superior Court, Law Division, Bergen County, Indictment No. 17966, unpublished opinion of November 29, 1972, which applied the standards and reached the result urged by Mr. Justice Heher in his dissent. In the light of *State* v. *Cormier, supra,* 56 N.J. 494 (1966), *State* v. *Bell, supra,* 55 N.J. 239 (1970), and *State* v. *Ebron, supra,* 61 N.J. 207 (1972), as well as *Ashe* v. *Swenson, supra,* 397 U.S. 439, 70 S. Ct. 1189, 25 L.Ed. 2d 469 (1970), the judicial pendulum has inscribed an arc so sweeping in this sector of our jurisprudence that the viability of earlier determinations must be reexamined.

In the three-count Indictment under review, the same circumstances form the background of the respective charges of bribery, unlawful takings and misconduct in office. Defendant, Joseph A. Triano, while Deputy Clerk of the Criminal Division of the District Court of Hudson County, a public office, was allegedly approached by an attorney at law, Abraham J. Chasnoff, on behalf of his client, James M. Cairns, who had been given a summons for driving while intoxicated, N.J.S.A. 39:4-50. The alleged acceptance by the Defendant of the sum of one hundred dollars was said to be in exchange for his undertaking and representation made to Chasnoff that he, the Defendant, would use his public office to obtain a certain disposition of the criminal charges then pending against Cairns, namely by amending the summons to charge the lesser offense of driving while impaired, N.J.S.A. 39:4-

50 (b) and by having a plea to the lesser offense accepted. In summary, the criminal action pending against Cairns, and the alleged prostitution of his office by the Defendant in processing the action, form the substance of each and every one of the three counts.

In making an analysis of the specific charges framed in the three counts of the Indictment, the Third Count will provide the point of departure. The record will be canvassed for the evidence, the charge, and other relevant matter in order to isolate the issues adjudicated and the issues which survive, if any. The Third Count alleges, in relevant part, that the Defendant during November 5, 1971 and November 24, 1971,

> ". . . willfully, maliciously and corruptly violated his duty to the public, to faithfully, impartially, fairly and justly treat, manage, and process all criminal complaints and summonses in the Hudson County District Court, in exercising the duties of the public office of Deputy Clerk of the Criminal Division of the Hudson County District Court, and did misperform and misconduct duties of his said office, as the same related to the case of State of New Jersey vs. James M. Cairns, an action then and there pending in the Hudson County District Court, by undertaking to process, dispose of, and deal with said case in an unfair, partial and unjust manner, by committing the following respective acts of misconduct:
>
> 1. Defendant Triano did represent and state to said Abraham J. Chasnoff, in connection with the said criminal action pending against James M. Cairns, that defendant Triano would obtain

the consent of the two police officers who initiated the said criminal action to a disposition of said criminal action favorable to James M. Cairns, by means of payment of cash monies (to be supplied by Abraham J. Chasnoff to defendant Triano) to said police officers;

2. Defendant Triano did, in connection with said criminal action against James M. Cairns, unlawfully and improperly amend and change Summons No. CA52000 of the Hudson County District Court in the following manner: The Summons, as filed, alleged that James M. Cairns violated the provisions of N.J.S. 39:4-50; defendant Triano unlawfully, and without authority, did amend said Summons to allege a violation of a lesser offense, N.J.S. 39:4-50-B;

3. Defendant Triano did accept and receive the sum of One Hundred Dollars ($100.00) in cash from one Abraham J. Chasnoff, a New Jersey attorney, then and there representing said James M. Cairns, in exchange for the undertaking of defendant Triano to influence and control the disposition of said criminal action in a manner favorable to James M. Cairns as aforesaid;

all being contrary to the provisions of N.J.S. 2A: 85-1, against the peace of this State, the Government and dignity of the same."

The core of the specific act of misconduct first enumerated is the alleged undertaking by the Defendant to effectuate the disposition of a pending criminal action by means of the payment of cash monies to be supplied by

one Chasnoff, to the Defendant. The First Count, in comparison, alleged that the Defendant did receive the sum of $100.00 "in cash as a bribe, present or reward from Abraham J. Chasnoff, an attorney-at-law of the State of New Jersey, which bribe was accepted pursuant to defendant's undertaking and representation, made to said Abraham J. Chasnoff, that defendant, by reason of his said public office, would obtain a certain disposition of certain charges then pending in the Hudson County District Court against one James M. Cairns, ..." In addition to a comparison of the respective recitals of the allegations, the court has resorted to extensive trial notes pertaining to these specific allegations as well as to the charge. As to the latter, the elements of the crime of bribery, as charged, included the receipt of any undue reward by a public officer designed to influence his behavior in office and to incline him to act contrary to the known rules of honesty and integrity. The charge of the elements of the crime of bribery, here succinctly stated, was supplemented with the instructions on the element of criminal intent.

Reserving consideration of the second specific act of misconduct, the third specific act alleges, in relevant part, that the Defendant, as Deputy Clerk of the Criminal Division of the District Court, ". . . did accept and receive the sum of One Hundred Dollars ($100.00) in cash from one Abraham J. Chasnoff, . . . in exchange for the undertaking of defendant Triano to influence and control the disposition of said criminal action in a manner favorable to James M. Cairns as aforesaid: . . ." There is spelled out in but a cursory reading of the accusation the essential elements of the crime of bribery. Moreover, when the elements of the crime of extortion or unlawful takings are superimposed, there is more than a close parallel.

Appendix B

The Second Count complained that the Defendant, unlawfully and by color of his office as Deputy Clerk, did receive from Chasnoff a fee and reward in the approximate amount of One Hundred Dollars in cash, the same not allowed by law for performing his duties. The charge to the Jury quoted the words of the statute, N.J.S.A. 2A:105-1, verbatim, supplemented with the instruction that "A person takes money not due to him in violation of this statute when he receives a fee or reward to which he is not legally entitled by reason of or in connection with his official duties. In this respect, proof of receipt of a knowingly unlawful payment in connection with an officer's duties is enough and furnishes the necessary criminal intent."

The parallel of the terms of the alleged third specific act of misconduct with the terms of the charge pertaining to unlawful takings clearly establishes an identity of issues comprising the same or similar facts which make up both accusations.

A collation of the evidence from the trial notes discloses that the Jury heard testimony from Chasnoff concerning the corrupt bargain as alleged and also testimony from William Flannery, Martin Greenberg, and Thomas St. Pierre, all of the Prosecutor's staff, concerning the monitoring electronically of conversations between the Defendant and Chasnoff arranging the allegedly undertaking and the consummation of same. Moreover, the Jury heard relevant portions of two tape recordings of the conversations which had been monitored. There was also received into evidence currency in the form of a one hundred dollar bill, accompanied by testimony that the bill had been marked. There was tes-

timony that the marked bill had been supplied to Chasnoff, given by him to the defendant, and then was retrieved from a safe, located proximate to Defendant's desk in the office of the Clerk of the District Court, coincident with his arrest.

The canvass of the record in the form of the court's trial notes, the Indictment, the charge, as well as a consideration of "all of the circumstances of the proceedings," make the conclusion inescapable that there is an identity of issues with the same or similar constituent facts making up both the charge of bribery in the First Count and the first specific alleged act of misconduct in the Third Count. Likewise, the same conclusion is sustained as to the charge of extortion or unlawful takings in the Second Count and the third specific alleged act of misconduct in the Third Count.

Finally, there is left for consideration the second alleged act of misconduct, which asserts that the Defendant, in his capacity as Deputy Clerk, did, "in connection with said criminal action against James M. Cairns, unlawfully and improperly amend and change" a Summons "unlawfully and without authority" from the charge of driving an auto while under the influence of alcohol, N.J.S.A. 39:4-50, to the lesser offense of driving while impaired, N.J.S.A. 39:4-50 (b). Do the accusatory acts fall within the ambit of the first two Counts of the Indictment?

The corrupt bargain which constituted the State's case on the bribery count centered around the alleged undertaking on the part of the Defendant to "obtain a certain disposition of certain charges then pending in the Hudson County District Court against one James M. Cairns, . . ." Likewise, the unlawful takings charge in

the Second Count was tried in the context of "a criminal action pending before the Criminal Division of the Hudson County District Court," in the words of that Count. The charges and the criminal action have reference to a Summons No. CA52000, which charged driving while intoxicated, N.J.S.A. 39:4-50, issued to James M. Cairns.

The evidence adduced by the State directed to establishing the guilt of the Defendant of the charges of bribery and extortion included the evidence summarized *infra* as well as the testimony of Norman R. Sierfeld, patrolman, Hudson County Police, who issued the Summons in question to James M. Cairns; of Margaret Prendergast, formerly Principal Clerk in the District Court, Criminal Part, who described the procedure of the office relating to the processing of complaints, and the method of maintaining the docket book and other controls; of Ordway Hilton, an examiner of questioned documents, otherwise described as a handwriting expert. The handwriting expert testified concerning the revision or amendment of the Summons by the inscribing of the letter "b" to the original statutory designation N.J.S.A. 39:4-50. After comparing the Summons with known specimens of Defendant's handwriting, Mr. Hilton was unable to testify that the "b" was in the hand of Defendant, but at the same time he could not exclude the Defendant as the scrivener.

The State also called Edward Burke, Inspector, Hudson County Police, who testified about the procedure in processing a summons; he said he did not recall getting a call to have the arresting officers appear in the District Court on the date of the scheduled hearing.

The Defendant did not testify, but among witnesses called on his case was Judge John J. McCole of the Hud-

son County District Court. On cross-examination, Judge McCole testified that the Deputy Clerk does not have authority to alter a traffic summons; that he, Judge McCole, had not approved of the amendment of the letter "b" to the traffic summons in question, and that he would not accept a plea of guilty to a lesser offense in the absence of the police officers concerned.

A content analysis of the evidence adduced by the State, both quantitatively and otherwise, directed to the counts of bribery and unlawful takings, distinctly put in issue the allegation that Defendant Triano unlawfully and improperly amended the summons. Indeed, it could be said that the unlawful tampering of the Summons, and the allegedly unlawful manner in which the Summons was processed by the Defendant, constituted the core of the State's case. The accusatory act of tampering with the summons formed an integral part and necessary ingredient of the offenses charged, and supplied a *quid pro quo* of the alleged bribe and extortion. On those charges the Defendant was exonerated.

Where the "fact prosecuted" is the same in several counts of an indictment, though the offenses differ in coloring and degree, and the Defendant is acquitted as to one or more counts, but there is disagreement on another count, there is prior jeopardy. So it is that collateral estoppel does not require an identity of offenses, associated with the classic definition of double jeopardy, but rather a congruence of "facts prosecuted." See *State* v. *Leo Proulx,* 263 A.2d 673, 675 (S.Ct. N.H. 1970).

This decision rests upon the doctrine of callateral estoppel, defined by Mr. Justice Wachenfeld in these words: "The doctrine of collateral estoppel . . . precludes the

relitigation between the same parties of the identical factual question previously tried between them, where it is isolated and determinative of the basic factual issue involved. *Restatement, Judgments,* Sec. 68; See *Mazilli* v. *Accident & Cas. Ins. Co.,* 26 N.J. 307 (1958). It applies in criminal as well as in civil cases." *State* v. *Emery,* 27 N.J. 348, 359 (1958), also noted in *State* v. *Bell,* 55 N.J. 239, 245-246 (1970). However variously the doctrines of double jeopardy, *res judicata* and collateral estoppel may be defined, the principle is fundamental that when a question of fact or law has been distinctly put in issue and a verdict rendered thereon, such question of fact or law may not afterwards be relitigated. See *State* v. *Cormier, supra,* 46 N.J. 494, 505 (1966).

Counsel for the State candidly stated during argument that the evidence which would be addressed to the Third Count at a second trial would be "substantially the same" as that submitted to the Jury at the prior trial. While the "same evidence" test, as already noted, has been supplanted as being too narrow, today, when "the core of the prosecutor's case," would be the same in a subsequent trial relitigation will not be sanctioned. *Sealfon* v. *United States, supra,* 332 U. S. at 580, 68 S. Ct. at 240, 92 L.Ed. at 185, cited in *State* v. *Cormier, supra,* 46 N.J. at 506-507. See *United States* v. *Kramer,* 289 F.2d 909 (2 Cir. 1961).

In applying the doctrine of collateral estoppel, the Supreme Court has declared that the rule "is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe* v. *Swenson, supra,* 397 U.S. at 444, 90 S.Ct. at 1194, 25 L. Ed. 2d at 475 (1970). The same admonition has been voiced by the Supreme Court of New

Jersey in urging that the doctrine not be applied grudgingly: "The broadening policy considerations in favor of safeguarding individual rights of defendants and the need for conserving public energies as well as public funds, strongly suggest that where, as here, a jury has considered and rejected the State's contention in favor of the defendant's contention on the issue submitted as the crucial one, the matter should be permitted to rest in its entirety." *State* v. *Cormier, supra,* 46 N.J. 494, 509 (1966). Similar considerations were advanced by the Court in *State* v. *Bell, supra,* 55 N.J. at 246: "The State has sufficient resources to prepare its case thoroughly at the first trial, and considerations of individual rights of defendants and of public expense and energy demand that a matter should be finally put to rest at some point in time.

This court adopts the rationale of Mr. Justice Hoher, writing in *State* v. *DiGiosia,* 3 N.J. 413 (1950): "The responsibility for the acquittal is the Jury's. A miscarriage of justice by a jury on the trial of an indictment is not correctible by another prosecution of the indictment or by a trial of a new indictment for the same offense. Such occasional failures of justice are outweighed by the general personal security afforded by the great principle of freedom from double jeopardy. Such misadventures are the price of individual protection against arbitrary power."

The motion of the defendant to dismiss the Third Count of the Indictment on the grounds of collateral estoppel is granted. An appropriate order may be submitted.

APPENDIX C

Decision of Judge Leonard, Superior Court, New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION—A-1535-72

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

JOSEPH A. TRIANO,

Defendant-Respondent.

Argued February 4, 1974—Decided February 21, 1974

Before Judges Leonard, Allcorn and Crahay.

On appeal from Hudson County Court, Law Division.

Mr. Edwin H. Stern, First Assistant Prosecutor, argued the cause for appellant (Mr. Geoffrey Gaulkin, Hudson County Prosecutor, attorney; Mr. Richard Abramson, Legal Assistant, on the brief).

Mr. Gerald D. Miller argued the cause for respondent (Messrs. Miller, Hochman, Meyerson & Miller, attorneys).

The opinion of the court was delivered by

LEO[illegible]RD, P.J.A.D.

Appendix C

The State appeals from a final judgment dismissing the third count of an indictment returned against defendant.

In a three count indictment defendant was charged with (1) bribery, (2) unlawful taking of a fee and (3) misconduct in office. The basis of the indictment was that defendant, as Clerk of the Criminal Division of the Hudson County District Court, accepted $100 to reduce a charge pending in that Court against one Cairns for operating an automobile while under the influence of intoxicating liquor (N.J.S.A. 39:4-50(a)) to one of operating said vehicle while impaired (N.J.S.A. 39:4-50(b)) and that he unlawfully altered the original summons issued to Cairns to allege a violation of the lesser offense.

Following a 17-day trial, the jury acquitted defendant on the first and second counts of the indictment. However, it was unable to reach a verdict on the third count and a mistrial was declared as to that charge.

Thereafter, defendant moved for a dismissal of the third count. Following a hearing, the trial judge, in a written opinion, dismissed that count on the grounds of collateral estoppel and an appropriate judgment was entered.

We reverse. It is our opinion that collateral estoppel does not preclude defendant's retrial on the third count of the indictment. *State* v. *Roller,* 29 N.J. 339 (1959). Here the State was not engaging in unfair *plural* attempts to convict defendant for a single offense. Rather, following the discharge of the jury by reason of the fact that it could not agree upon a verdict as to one count of a multiple count indictment, the State was merely seeking to obtain a determination in the *same trial* on the charge preferred under that count. Thus, the acquittal

under the first two counts in nowise bars the continuance of the trial on the third count of the indictment. *Id.* at 349-50.

Defendant's contention that *State* v. *Roller, supra,* is not applicable because the dismissal of the pertinent indictment therein was by the trial judge and not by jury resolution, is without merit. The Court in *Roller* notes and adopts the trial court's view that the dismissal was "equivalent to a judgment of acquittal" (at p. 343).

State v. *Cormier,* 46 N.J. 494 (1966), upon which defendant relies, is inapposite. That case involved a subsequent trial upon a second indictment charging a substantive offense following a trial resulting in an acquittal upon a separate indictment which solely charged a conspiracy to commit the same offense. Thus, therein there were two separate trials upon two distinct indictments. Here, as above noted, there was but one trial upon a multiple count indictment.

Finally, defendant cites *Cosgrove* v. *United States,* 224 F.2d 146 (9th Cir. 1955); *United States* v. *Flowers,* 255 F.Supp. 485 (E.D.N.C. 1966) and *Oliver* v. *Superior Court,* 267 P. 764 (Dist. Ct. Cal. 1928), which hold contrary to our determination herein. We do not consider these cases to be binding upon us.

Accordingly, the dismissal of the third count of the indictment is reversed and the matter is remanded to the trial court for a plenary trial thereon.

APPENDIX D

Order of the Supreme Court, New Jersey Denying Certiorari

SUPREME COURT OF NEW JERSEY
C-527 SEPTEMBER TERM 1973

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

JOSEPH A. TRIANO,

Defendant-Appellant.

This matter having been duly presented to the Court, it is ORDERED that the appeal is dismissed pursuant to Rule 2:11-9.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 30th day of April, 1974.

FLORENCE R. PESKOE
Clerk

Filed
Apr 30 1974

FLORENCE R. PESKOE
Clerk

APPENDIX E

Order of the Supreme Court of the United States Denying Certiorari (Mr. Justice Brennan and Mr. Justice Stewart for Granting Certiorari)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D. C. 20543

October 15, 1974

Gerald D. Miller, Esq.
Miller, Hochman, Meyerson & Miller
40 Journal Square
Jersey City, N. J. 07306

RE: TRIANO v. NEW JERSEY, 73-1887

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case. Mr. Justice Brennan and Mr. Justice Stewart would grant certiorari.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By HELEN TAYLOR
Helen Taylor, (Mrs.)
Assistant Clerk

cc: Hon. William F. Hyland
Atty. Gen. of N.J.
State House Annex
Trenton, N.J. 08625

Appendix E

David S. Baime, Chief Appellate Section
Robert W. Gluck, Dep. Atty. Gen. of N.J.
Div. of Criminal Justice—Appellate Section
7 Glenwood Ave.
East Orange, N.J. 07017

APPENDIX F

Decision of Judge Herbert J. Stern, United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION No. 75-98

UNITED STATES OF AMERICA ex rel. JOSEPH A. TRIANO,

Petitioner,

v.

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION; HUDSON COUNTY COURT, LAW DIVISION; and JAMES T. O'HALLORAN, Hudson County Prosecutor,

Respondents.

Appearances:

LEONARD MEYERSON, ESQUIRE
Attorney for Petitioner

JAMES T. O'HALLORAN, Hudson County Prosecutor
By: Gary Newman, Assistant Prosecutor

STERN, District Judge

This is a petition for habeas corpus, brought on the eve of petitioner's state court trial, which alleges that the

pending state prosecution violates his rights under the Double Jeopardy Clause of the Constitution.

On December 2, 1971, the Hudson County Grand Jury charged petitioner, in Indictment No. 326-71, with bribery (Count 1), unlawful taking (Count 2) and misconduct in office (Count 3).

Count 1 charges petitioner with accepting a bribe in connection with government service, in violation of N.J. S.A. 2A:93-6, alleging that he did "willfully, knowingly, unlawfully and corruptly receive approximately $100 in cash as a bribe, present or reward" in return for obtaining an improper disposition of a pending criminal complaint (RB: 25).

Count 2 of the indictment charges petitioner with unlawful taking, in violation of N.J.S.A. 2A:105-1, alleging that he did "willfully, knowingly, unlawfully and by color of his office" receive "from Abraham J. Chasnoff . . . a fee and reward in the amount of approximately One Hundred Dollars ($100.00) in cash, the same not allowed by law to the said Joseph A. Triano for performing his duties as Deputy Clerk of the Criminal Division of the Hudson County District Court." (RB: 25)

Count 3 of the indictment charges petitioner with misconduct in office, in violation of N.J.S.A. 2A:85-1, based on three separate acts allegedly committed by him: (a) representing to Chasnoff that petitioner would obtain a favorable disposition of the charges against James Cairns; (b) amending the summons of James Cairns; and (c) accepting $100.00 (PB:2).

The jury returned a verdict of not guilty on Counts 1 and 2, but was unable to reach a verdict on Count 3. Ac-

cordingly, judgment of acquittal was entered on Counts 1 and 2, and a mistrial was declared as to Count 3.

Petitioner successfully sought an order in Superior Court dismissing Count 3 on grounds of double jeopardy, which was granted on a theory of collateral estoppel by the trial court, Young, J.S.C., on January 22, 1973. The State appealed from the judgment of dismissal, and on February 21, 1974, the Appellate Division of the Superior Court reversed the dismissal and ordered a plenary trial. Petitioner's attempts to secure review by the New Jersey Supreme Court were denied on April 30, 1974. A petition for certiorari was denied by the United States Supreme Court on October 15, 1974, Justices Brennan and Stewart dissenting.

The State now seeks to try petitioner for misconduct in office, the offense charged in Count 3, based on all three of the allegations of wrongful conduct set forth in that Count.

The matter was set for trial on January 24, 1975 before Judge Thuring in Superior Court. Petitioner moved to preclude the State from introducing at retrial substantive evidence of the bribery and unlawful taking of which the first jury exonerated him. After oral argument, Judge Thuring denied the motion in an opinion dated January 20, 1975. The instant petition was filed in this Court on January 21, 1975.

At a hearing before this Court on January 21, 1975, the State represented that it would not move the indictment for retrial while the matter was pending before this Court (Tr. 1/21/75:4-6; 25-26).

On the morning of January 22, 1975, however, the Court received a telephone call from counsel for petitioner.

Appendix F

Counsel for the State was present with counsel for petitioner when the call was made, and also spoke with the Court. At that time, the Court was informed that superiors of the Assistant Prosecutor who had appeared the previous day had "overruled" the State's representation that the matter would not be moved for retrial, and that the State now intended to proceed with the retrial as scheduled, on Friday, January 24, 1975 (Tr. 1/22/75:6). The parties were ordered to appear before this Court for an emergent hearing.

The Fifth Amendment, as applicable to the states through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U.S. 784 (1969), reads in pertinent part:

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; . . .

It is clear from judicial construction of the Double Jeopardy Clause that the evil against which the clause protects a state defendant is not a second *conviction* or a second *punishment* for the same crime. Rather, the provision protects an individual against the second *trial* itself. As the court noted in *Ashe* v. *Swenson*, 397 U.S. 436, 445-446 (1970), in holding that federal principles of collateral estoppel were embodied in the Double Jeopardy Clause:

> For whatever else that constitutional guarantee may embrace, North Carolina v. Pearce, 395 U.S. 711, 717, it surely protects a man who has been acquitted from having to "run the gantlet" a second time. Green v. United States, 355 U.S. 184, 190.

Appendix F

At the hearing the State of New Jersey announced its intention to divest this Court of jurisdiction by moving the retrial before this Court could determine whether the very moving of the case in state court would do violence to the United States Constitution.[1]

---

[1] After extensive argument, there occurred the following colloquy between the Court and counsel for the State:

> Mr. Megill: . . . Believe me, I don't want your Honor to get the impression that what our office has done, through my direction, is in any way attempting to be an affront to your Honor. It is in the part of the legal spectre of the State that the State feels it is permitted or entitled to go forward with the trial.
>
> The Court: Do you still feel that way?
>
> Mr. Megill: I do, Judge, I do. . . .
>
> • • •
>
> The Court: Will not your unilateral action moot the issue before me, namely whether or not a habeas should be issued to prevent the State trial?
>
> • • •
>
> What I am asking you is this: Will you not, by your unilateral action deprive me of jurisdiction before I have determined whether I have jurisdiction? Please answer the question.
>
> Mr. Megill: Our moving the trial will if your Honor hasn't yet decided by Friday whether your Honor has jurisdiction, then our action would do that . . . .

(Tr. 1/22/75: 23-24)

> The Court: Will you, pending the receipt of briefs, and argument on the issue, move the case for trial? . . .
>
> Mr. Megill: I would move it on Friday, I would.
>
> The Court: All right. . . . I am going to stop the prosecution pendente lite here. I cannot, consistent with the duty I owe to enforce the Constitution of the United States, permit the Hudson County Prosecutor's Office unilaterally to deprive this Court of jurisdiction.

(Tr. 1/22/75: 29)

Accordingly, the Court entered an order on January 23, 1975 (1) staying all proceedings in the Superior Court in the matter of *State of New Jersey* v. *Joseph A. Triano,* Indictment No. 326-71, pursuant to 28 U.S.C. §2251;[2] (2) issuing a Writ of Habeas Corpus ad Testificandum removing all restraints on petitioner pending this Court's disposition of the petition;[3] and (3) enjoining the Hudson County Prosecutor and his staff from proceeding with the prosecution of petitioner pending disposition of the petition by this Court, pursuant to 28 U.S.C. §1651(a).[4]

This Court has jurisdiction to consider this petition in advance of the state trial, under 28 U.S.C. §2241(c)(3).

---

[2] §2251. Stay of State court proceedings

> A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.
>
> After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

[3] *See Johnston* v. *Marsh,* 227 F.2d 528 (3rd Cir. 1955); *United States ex rel. Slough* v. *Yeager,* 449 F.2d 755 (3rd Cir. 1971).

[4] §1651. Writs

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Appendix F

Braden v. *30th Judicial Circuit Court of Kentucky,* 410 U.S. 484 (1973).

Petitioner is presently free on his own recognizance pending retrial on Count 3 of Indictment No. 326-71 in Superior Court, Hudson County. A defendant released on his own recognizance is "in custody" within the meaning of §2241, whether he is awaiting sentence, *Hensley* v. *Municipal Court,* 411 U.S. 344 (1973), or awaiting trial, *United States ex rel. Russo* v. *Superior Court,* 483 F.2d 7, 12 (3rd Cir. 1973), *cert. denied* 414 U.S. 1023 (1973). Although there is no requirement in §2241(c)(3) that State remedies be exhausted before a pretrial federal habeas proceeding may be maintained, an exhaustion requirement has nevertheless developed in case law, and "although there is a distinction in the statutory language of §2254 and §2241, there is no distinction insofar as the exhaustion requirement is concerned." *Moore* v. *DeYoung,* No. 74-1858, at 7 (3rd Cir., filed April 8, 1975).

Although this Court has jurisdiction to consider a pretrial petition for habeas corpus without exhaustion of state remedies, *cf. Ex Parte Royall,* 117 U.S. 241 (1886), the question arises whether that jurisdiction should be exercised.

In *Royall,* the petitioner was indicted in state court for selling a bond coupon without a license. Before trial, he petitioned for a federal writ of habeas corpus, on the ground that the state statute upon which the indictment was predicated violated the Contract Clause, insofar as it was applied to the owners of coupons. The court, while noting that the statute gave a federal court the power to grant the writ before trial, upon a sufficient showing of unconstitutional custody and even where the state court

was fully competent to pass on the federal defense at trial, held that the statute did not always "imperatively require [the federal court], by writ of habeas corpus, to wrest the petitioner from the custody of the state officers in advance of his trial in the state court." The court continued, 117 U.S. at 251-252:

> We cannot suppose that Congress intended to compel these [federal] courts . . . to draw to themselves in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. . . . That discretion [as to the time and mode in which the court will exert its statutory powers] should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.
>
> * * *
>
> The [federal] court was not at liberty, under the circumstances disclosed, to presume that the decision of the state court would be otherwise than is required by the fundamental law of the land or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the Constitution and laws of the United States.

It is clear that "the references in *Royall* to the trial court's 'discretion' were not to be taken seriously; [the Court] routinely reversed grants of the writ prior to exhaustion of state remedies where no special circumstances were present." P. Bator, C. Mishkin, D. Shapiro, H. Wechsler, Hart & Wechsler's *The Federal Courts and the Federal System* 1488 (2nd ed. 1973).

In *Braden,* Mr. Justice Rehnquist summarized the *Royall* doctrine:

> The history of habeas corpus and the principles of federalism strongly support the approach established by *Ex parte Royall, supra,* that, absent extraordinary circumstances, federal habeas corpus should not be used to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court.

410 U.S. at 505 (dissenting opinion of Rehnquist, J.). The *Braden* majority agreed with this summary of the law, while distinguishing it from the case then before the court. 410 U.S. 489.

The rule requiring exhaustion of state remedies, then, "is not one defining power but one which relates to the appropriate exercise of power. *Bowen* v. *Johnston,* 306 U.S. 19, 27." *Fay* v. *Noia,* 372 U.S. 391, 420 (1963).

The United States Court of Appeals for the Third Circuit recently stated the law in this area:

> The teaching derived from these authorities may be stated as:
>
> (1) federal courts have "pre-trial" habeas corpus jurisdiction;

> (2) that jurisdiction without exhaustion should not be exercised at the pre-trial stage unless extraordinary circumstances are present. *See Frisbie* v. *Collins,* 342 U.S. 519, 520-521 (1952); *Reid* v. *Jones,* 187 U.S. 153, 154 (1902); *United States ex rel. Richardson* v. *Rundle,* 461 F.2d 860, 864-65 (3rd Cir. 1972), *cert. denied* 410 U.S. 911 (1973).
>
> (3) where there are no extraordinary circumstances and where petitioner seeks to litigate the merits of a constitutional district court should exercise its "pre-trial" habeas jurisdiction only if petitioner makes a special showing of the need for such adjudication and has exhausted state remedies. *Braden, supra.*

Moore, supra, at 9-10.

Petitioner maintains that his claim of double jeopardy alleges extraordinary circumstances justifying and requiring the availability of a federal forum to consider the merits before the commencement of the state trial. The Court agrees.[5]

Under Judge Thuring's ruling,

> at retrial, the state will be permitted to present the full panoply of events charging misconduct in office under the Third Count including the right to introduce for substantive purposes evidence relative to the alleged taking of the bribe money.

Op., at 13.

---

[5] This issue was expressly left open by the Court of Appeals in *Moore.* *Moore* v. *DeYoung, supra,* at 15, n.11.

The State has announced that it will use such evidence at petitioner's retrial (Tr. 1/21/75: 21). It is the conclusion of this Court that in the fact of such a history, a federal court cannot simply refuse to hear the matter, presumably on grounds of comity, thus effectively forcing petitioner again to "run the gantlet" of trial.

If petitioner's position is correct on the merits, then the state courts have declined to follow "the fundamental law of the land" by ordering him "twice placed in jeopardy for the same offense." If petitioner is correct, post-conviction federal relief will be insufficient to vindicate his federal right against double jeopardy in the event of conviction, and unavailable in the event of acquittal.

In such a situation, there exist "exceptional circumstances of particular urgency," and "a federal court should entertain [the] petition for habeas corpus, else [petitioner] would be remediless." *Ex parte Hawk,* 321 U.S. 114, 117-118 (1944). The instant case meets this test; accordingly, this Court will exercise its jurisdiction to consider the merits.

As the Court has noted, the Fifth Amendment prohibition of double jeopardy binds the states through the Due Process Clause of the Fourteenth Amendment. *Benton* v. *Maryland, supra.*

In *Ashe* v. *Swenson, supra,* the Supreme Court declared the doctrine of collateral estoppel to be of constitutional dimension, for the purposes of the Fifth Amendment, and embodied in the Double Jeopardy Clause. 397 U.S. at 445.

The fundamental question to be determined here is the test to be applied in measuring the collateral estoppel

effect of the prior proceedings for double jeopardy purposes. In *Ashe,* the court rejected the traditional "same cause of action" and "same evidence" tests:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Sealfon* v. *United States,* 332 U.S. 575, 579. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal. [Footnotes omitted]

397 U.S. at 444.

In the instant case, the "issue which the defendant [petitioner] seeks to foreclose from consideration" at the second trial is that of "bribery and extortion [unlawful taking] in which the key evidence offered was a "marked hundred dollar bill!" (PB: 15)

It should be noted, and petitioner concedes (Tr. 1/21/75; 16-20), that the acquittals on Counts 1 and 2 do not,

without more, bar prosecution for the crime charged in Count 3 under the doctrine of *res judicata*. Bribery, unlawful taking and misconduct in office are all separate crimes, each prohibited by a separate statute. Neither bribery nor unlawful taking are lesser included offenses or necessary elements of the crime of misconduct in office, which may be committed by other kinds of activities, or by failure to act. Moreover, whatever may be said about the possible overlapping between the first two counts and the first and third allegations of Count 3, that is, between the bribery charged in Count 1, the unlawful taking charged in Count 2 and paragraphs (a) and (c) of Count 3, where petitioner is accused of misconduct in requesting the $100.00 (a) and accepting the $100.00 (c), paragraph (b) of Count 3, which alleges misconduct by him in altering court papers is, as a matter of law, a separate allegation of wrongdoing. Whether or not, under the facts of this case, the crimes charged are separable for purposes of trial, petitioner's acquittal of accepting a bribe (Count 1) and of unlawfully taking a fee or reward (Count 2) does not thereby render *res judicata* the state's allegation that he committed misconduct in office by altering court documents.

Paragraphs (a) and (c) of Count 3 may well be barred by collateral estoppel, as embodied in the constitutional protection against double jeopardy. *Ashe* v. *Swenson, supra.* Although the crime of misconduct in office and the crimes of bribery and unlawful taking are indeed separate crimes, they overlap when the state charges the identical conduct, that is, the solicitation or the receipt of an illegal payment, as *the* unlawful taking and *the* specific act of misconduct in office. *Ashe* v. *Swenson, supra,* at 453-454 (concurring opinion of Brennan, J.):

cf. Ciuzio v. *United States*, 416 U.S. 995, 996-997 (1974), *denying cert. to United States* v. *Cioffi, et al.*, 487 F.2d 492 (2nd Cir. 1973) (dissenting opinion of Brennan, J.). This may be the case with respect to two of the allegations of the misconduct charge, paragraph (a) (the allegation of the $100.00 solicitation) and paragraph (c) (the allegation of the payment). Petitioner contends the State is collaterally estopped from proving those two charges at the forthcoming trial by virtue of petitioner's prior acquittal on precisely those charges at the earlier trial.

Just as the protection against double jeopardy combines with elementary principles of *res judicata* to prevent the State from twice prosecuting a defendant for the same statutory crime, so does double jeopardy encompass the doctrine of collateral estoppel as well, prohibiting the state from twice asserting identical factual allegations against an individual, where the first assertion of those allegations resulted in an acquittal. The doctrine of double jeopardy thus includes not merely the prohibition against twice prosecuting for the same *crime*, but also the proscription of twice prosecuting on the basis of the same *factual contentions*, albeit for different crimes, at least after those facts have been judicially determined against the State.[6]

However, while the Double Jeopardy Clause of the United States Constitution prohibits second prosecutions which are based on collaterally-estopped factual contentions, to the same extent as it prohibits a second prosecu-

---

[6] It may be that after a conviction, the identical facts may be used again, in addition to other facts, to prove an entirely different crime which is not a lesser included offense of the first. But that is not this case and the Court does not reach it.

tion for a crime already *res judicata* by virtue of a prior acquittal or conviction, a United Ctates Court examining the constitutionality of the second prosecution is in a materially different position, depending on which of the two species of double jeopardy is alleged.

In the first instance the task is relatively simple, since a mere comparison of the two indictments will normally reveal whether the defendant is threatened with double prosecution for the same crime. On the other hand, the second type of double jeopardy analysis is different, and, in some cases, may be an impossible pretrial determination.

To decide whether the State will attempt to rely, in a second prosecution, on factual contentions necessarily determined against it in a prior state trial of the same defendant, the federal court would first determine the facts which were necessarily decided against the State under the earlier general verdict of the state court jury. It would then be necessary for the federal court to make a *pretrial* determination whether the State could prove the different crime charged against the same defendant without relying on facts previously determined in his favor.

Obviously, this is an entirely different problem from that posed by the simple question of whether a person is threatened with a second prosecution for the same crime. It may be that in some cases it will be readily apparent, from the language of the indictment, that the State intends to try to introduce evidence foreclosed to it by collateral estoppel, but that is not to say that it would be clear either that the state trial judge would permit such evidence to be admitted, or that it would be impossible

to prove the crime charged without relying on the impermissible evidence. This is precisely the case at bar. It is, on the face of the indictment, entirely possible for the prosecution to prove that petitioner committed the crime charged simply by proving that he altered the summonses, without reference to any evidence concerning the $100.00. Whether as a practical matter such independent proof exists, or whether as a fact of litigation it is possible to segregate the one from the other, is simply beside the point. The fact remains that no federal court reading Count 3 can hold, as a matter of law, that Count 3 cannot be *moved for trial* without requiring petitioner to begin the second run of the gantlet, in violation of the United States Constitution.

In summary, when the crime itself is a thing adjudged, and the State indicts or moves to try an individual for the crime already disposed of, the United States Constitution is violated, and the United States Courts must act. To require instead that the defendant first answer, appear or otherwise move in the federally-barred state court proceeding would require him to relinquish the very constitutional right he is attempting to protect. The Fifth Amendment protects against double jeopardy, not merely against double conviction or double sentencing. However, when the crimes are different, and the court cannot as a matter of law hold that the second prosecution is barred on its face, the court's decision depends not only on a judicial determination of what has been conclusively determined against the State in the prior trial, but also judicial speculation on what the State intends and has the ability to prove in the second trial; that inquiry should proceed in the state trial and appellate courts until the remedies there have been exhausted. Federal trial courts

do not sit to render advisory opinions on the admissibility of evidence in pending state court trials.

If Count 3 of this indictment had contained only one allegation of misconduct in office, that of petitioner's alleged altering of documents, the preceding analysis would be dispositive of this petition.

However, petitioner claims that the first and third paragraphs of Count 3 allege, *in haec verba,* the very crimes of which he was acquitted in the first trial, and that therefore the mere moving of those two allegations again[7] violates the Double Jeopardy Clause of the United States Constitution.

The State contends that there is an important distinction between the solicitation and taking of money alleged in paragraphs (a) and (c) of Count 3, and the receipt of money alleged in Counts 1 and 2. The State contends that proof of the taking of the $100.00, as alleged in Counts 1 and 2, depended on the allegation that petitioner took the money for his own personal gain, while the identical solicitation and taking of the same $100.00, as alleged in paragraphs (a) and (c) of Count 3, turns on the allegation that petitioner collected the money for two policemen, not for his own benefit, and that in so acting for others he committed misconduct in office himself.

In support of each argument each side has analyzed the record of the prior testimony and the trial court's

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[7] The crimes charged in Counts 1 and 2 are bribery and the taking of an unlawful fee, which the petitioner claims are realleged in paragraphs (a) and (c) of Count 3.

charge in an attempt to demonstrate what was or was not conclusively determined at the first trial, and therefore, what is and what is not now foreclosed.[8]

---

[8] Petitioner maintains that "at the second trial on the sole count of misconduct, *which essentially charges bribery and extorsion,* the prosecutor is prohibited from once again introducing the similar evidence offered at the first trial." (PB: 15; emphasis added).

This Court has already noted, *supra* at 8, that the "same evidence" test is not the measure of collateral estoppel effect here. The "same evidence" could, in an appropriate case, conceivably be introduced at the second trial for an entirely different purpose than that which is served at the earlier trial. It is true that "having failed to prove certain illegal acts once, [the State] cannot be permitted to prove them again simply by changing the name of the crime." *McDonald v. Wainwright,* 493 F.2d 204, 207 (5th Cir. 1974). This Court is of the view, however, that unless proof of the foreclosed crimes is necessary to conviction at the second trial, that trial must be permitted to go forward. The issue is not the introduction of the "same evidence;" it is, rather, whether it is absolutely necessary to conviction at the second trial that the jury find against petitioner on an issue upon which the first jury found in his favor. As the Supreme Court held in *Ashe, supra,* at 446:

> Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that the petitioner was one of the robbers, the State could not present *the same or different identification evidence* in a second prosecution for the robbery of Knight in the hope that a different jury might find that evidence more convincing.

(Emphasis added)

Petitioner maintains that the allegation of misconduct in office, which the state seeks to retry, "essentially charges bribery and extortion," the crimes of which petitioner was found not guilty at the first trial. (PB: 15) To evaluate that contention this Court must

(Footnote continued on following page)

Appendix F

(Footnote continued from preceding page)

look to "the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter." *Ashe, supra,* at 444.

Three acts of misconduct in office were alleged in Count 3 of the indictment, and would presumably be reasserted at the second trial. They are, as noted earlier, the representation to Chasnoff that petitioner would obtain a favorable disposition of the charges against Cairns, the amendment of the Cairns summons by him, and his receipt of a $100 bill.

Chasnoff testified that, at petitioner's request, Chasnoff met with petitioner at the District Court Clerk's Office to discuss the Cairns case on November 5, 1971 (Tr. 10/3/72: 23). At that meeting, Chasnoff testified, petitioner "told me that he had been able to convince the officers to downgrade the case from A [driving while under the influence of alcohol] to B [driving while impaired]. He told me that I would have to bag them $50 apiece" (Tr. 10/3/72: 25-26). Chasnoff further testified that he and petitioner arranged that Chasnoff would give the officers $50 apiece so that they would not appear in court and the case would proceed as a "B" offense (Tr. 10/3/72: 26). Chasnoff was to deliver the money to petitioner in an envelope, according to his testimony, and, pursuant to the instructions of investigators of the Hudson County Prosecutor's Office, Chasnoff did so on November 25, 1971. This date had been set for the Cairns hearing, and the passing of the money, during a recorded telephone conversation between Chasnoff and petitioner on November 15, 1971 (Tr. 10/3/72: 41-44; 57-64). At that meeting, according to Chasnoff, petitioner displayed his copy of the summons, marked as a "B" summons (Tr. 10/3/72: 57-58). Upon leaving petitioner's office, Chasnoff immediately informed investigators from the office of the Hudson County Prosecutor of where petitioner had put the $100 bill (Tr. 10/3/72: 21), which had previously been marked (Tr. 10/10/72: 21). Petitioner was placed under arrest, and the marked bill seized from the safe (Tr. 10/10/72: 33-40).

(Footnote continued on following page)

(Footnote continued from preceding page)

The testimony of Chasnoff, supported by other evidence and testimony introduced by the state, sets forth the essentials of petitioner's allegedly illegal conduct. Since the summations in the first trial were not transcribed (Tr. 10/18/72: 164), it remains for this Court only to analyze Judge Young's charge to the jury.

Judge John J. McCole of the Hudson County District Court, called as a defense witness, testified on cross-examination that the alteration of a traffic summons or discussion of the downgrading of an offense was not within the scope of petitioner's official duties (Tr. 10/18/62: 66, 71).

The State argues that, despite the evidence of the receipt of money by petitioner, the jury could have acquitted him of Counts 1 and 2 simply because that money was not received in connection with his official duties. That may be so. However, the issue here is not what the jury may have decided, but rather what the jury *necessarily* decided in reaching verdicts of not guilty on Counts 1 and 2.

In that regard, Judge Young's instructions to the jury on Counts 1 and 2 clearly negated the effect of this portion of Judge McCole's testimony and forbade the jury to do what the State now speculates it may have done:

Count 1:

> Moreover, it is not necessary that the act requested be one which the official has the power to do. Sufficient it is if he has the official power, ability or apparent ability to bring about or contribute to the desired end.

Tr. 10/19/72: 174)

Count 2:

> "By color of office" is meant [sic] that the official position of the defendant *gave others the appearance of his having authority* to do or refrain from doing the act in question.

(Tr. 10/19/72: 175; emphasis added)

(Footnote continued on following page)

Appendix F

(Footnote continued from preceding page)

After careful review of Judge Young's charge to the jury on October 19, 1972 (Tr. 10/19/72: 165-195), this Court has concluded that the judge made "personal gain" an essential element of his instructions on Counts 1 and 2, but clearly and specifically excluded that element from his charge on Count 3.

(1) Count 1

In the course of his charge on Count 1, Judge Young made clear on several occasions his view that personal gain was an element of the offense charged. The Court told the jury: (emphasis added)

> (a) A police official is guilty of bribery when he receives any *undue reward* whatsoever in order to influence his behavior in office. . . .
>
> (Tr. 10/19/72: 173)
>
> (b) The official should be concerned with doing only what is proper for the public welfare and not be subjected to undue influence by *offers of reward for personal gain.*
>
> (Tr. 10/19/72: 174)
>
> (c) Such necessary criminal intent on the part of the defendant means an intent to use the opportunity to perform a public duty as a means of acquiring *an unlawful personal benefit or advantage.*
>
> (Tr. 10/19/72: 174)

(2) Count 2

As to Count 2, the Court instructed the jury: (emphasis added)

> The second count of the indictment charges the defendant, Joseph A. Triano, with unlawful takings [sic], in violation of N.J.S. 2A:105-1, which provides in its pertinent part as follows:

(Footnote continued on following page)

This Court need not decide the issue. Whether petitioner is right or wrong, whether the State is permitted or forbidden to prove the allegations of paragraphs (a)

(Footnote continued from preceding page)

> Any public officer who, by color of his office, receives or takes *any fee or reward,* not allowed by law, for performing his duty, is guilty.
>
> To sustain a violation of this statute it must be shown that the defendant was, one, an officer who, two, by color of his office, three, took money, four, that *was not due to him.*

(Tr. 10/19/72: 175)

> A person takes money not due to him in violation of this statute when he receives *a fee or reward* to which he is *not legally entitled* by reason of or in connection with his official duties.

(Tr. 10/19/72: 175-176)

This Court is satisfied that, taken together with the definition of "reward" given with regard to Count 1, Judge Young's charge on Count 2 effectively made "personal gain" an element of the unlawful taking charged.

(3) Count 3

As to Count 3, however, the Court expressly excluded the element of personal gain from the crime charged: (emphasis added)

> To prove criminal intent—that is, bad faith or evil motive or dishonesty, it is *not necessary* however for the state *to adduce proofs from which it could be inferred that the defendant intended to profit or otherwise benefit* from the acts alleged to have been done by the defendant or omitted by the defendant.

(Tr. 10/19/72: 179)

and (c), it is beyond dispute that it may prove paragraph (b) (Tr. 1/21/75: 17-18). It may prove, without violence to the Constitution, that petitioner committed the crime of misconduct in office by altering court records. This Court therefore cannot hold that the mere moving of this indictment in state court is violative of petitioner's constitutional rights. Any objection which he may have to any particular evidence which may be offered at trial, whether that objection be based on federal or state law, may be presented to the state tribunal which is lawfully and properly in the process of adjudicating the case.

In the absence of a showing by petitioner in this Court that the Double Jeopardy Clause of the Constitution prohibits the state forum from even considering the issues at and after the state court trial, he must exhaust his state court remedies before seeking the Great Writ here.

Accordingly, the petition will be dismissed, without prejudice to petitioner's right, should he be convicted, to petition again upon exhaustion of state court remedies.[9]

---

[9] As has been noted, this Court cannot make evidentiary rulings that will bind the state court at the new trial. However, the Court cannot but note Judge Thuring's ruling in his opinion of January 20, 1975, at 13-14:

> Accordingly, at retrial the state will be permitted to present the full panoply of events charging misconduct in office under the Third Count including the right to introduce for substantive purposes evidence relative to the alleged taking of the bribe money.
>
> Further, the court on its own motion under Evid. R. 4 directs that defendant at retrial be precluded from submitting

(Footnote continued on following page)

Accordingly, it is on this 6th day of May, 1975,

ORDERED, that the petition for a Writ of Habeas Corpus be, and it hereby is dismissed, and that the Order of the Court dated January 23, 1975 be, and it hereby is, vacated.

HERBERT J. STERN
United States District Judge

DATED: May 6, 1975

(Footnote continued from preceding page)

to the new jury any reference to the prior jury's findings of "not guilty" on Counts One and Two. This, on the ground that introduction of such evidence for probative reasons is greatly outweighed by the real risk of engendering absolute confusion in the minds of the jury were they to attempt to probe the reasons for the first jury's verdict.

Compare McDonald v. *Wainwright*, 493 F.2d 204, 206, n.2 (5th Cir. 1974).

APPENDIX G

Certificate of Probable Cause

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 75-98

UNITED STATES, *ex rel.* JOSEPH A. TRIANO,

Petitioner,

vs.

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY, HUDSON COUNTY COURT, LAW DIVISION, and JAMES T. O'HALLORAN, HUDSON COUNTY PROSECUTOR,

Respondents.

This matter being opened to the Court by Miller, Hochman, Meyerson & Miller, Esquires (Leonard Meyerson, Esquire, appearing) in the presence of Gary Newman, Esquire, Assistant Hudson County Prosecutor, upon the motion of the petitioner for a certificate of probable cause and such other relief as the Court deems necessary and proper, and the Court having heard and considered the arguments of counsel, and materials previously filed,

It is, on this 15 day of May, 1975,

CERTIFIED that probable cause for appeal does exist, and

Appendix G

ORDERED that the application for the restraint of further State Court proceedings is hereby denied.

HERBERT J. STERN U.S.D.J.

I hereby consent as to the
form of the within Order.

GARY NEWMAN
Assistant Prosecutor of Hudson County

Original Filed
May 15 1975

ANGELO W. LOCASCIO,
Clerk

APPENDIX H

Order of the Court of Appeals for the Third Circuit Affirming the Decision of the Federal District Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1542

UNITED STATES OF AMERICA ex rel. JOSEPH A. TRIANO,

Appellant,

v.

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY; HUDSON COUNTY COURT, LAW DIVISION and JAMES T. O'HALLORAN, HUDSON COUNTY PROSECUTOR

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 75-98)

Submitted Under Third Circuit Rule 12(6)
October 17, 1975

Before: ALDISERT, KALODNER and ADAMS, *Circuit Judges.*

Appendix H

JUDGMENT ORDER

After consideration of the contention raised by appellant, to-wit, that the doctrine of collateral estoppel bars the retrial of any issue resolved in a prior trial; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. Costs taxed against appellant.

By the Court,

ALDISERT
Circuit Judge

Attest:

THOMAS F. QUINN, Clerk

DATED: October 17, 1975

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-723

UNITED STATES *ex rel.* JOSEPH A. TRIANO,

Petitioner,

vs.

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY, HUDSON COUNTY COURT, LAW DIVISION, and JAMES T. O'HALLORAN, Prosecutor of Hudson County,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Counter-Statement of Matter Involved

Hudson County Indictment No. 326-71 charged petitioner, Joseph A. Triano, with (Count One) bribery, contrary to the provisions of N.J.S.A. 2A:93-6, and (Count

Two) extortion, contrary to the provisions of N.J.S.A. 2A:105-1, and (Count Three) misconduct in office, contrary to the provisions of N.J.S.A. 2A:85-1 (Pa1 to 4).

On October 20, 1972, the jury returned a verdict of not guilty on Counts I and II of the indictment but announced that it could not agree on a verdict as to Count III; consequently, a mistrial was declared as to that count.

Thereafter, defendant moved to dismiss the third count of the indictment, charging misconduct in office, on grounds of double jeopardy, *res judicata* and collateral estoppel. On January 22, 1973, the Honorable Raymond W. Young, J.C.C., granted the motion on the ground of collateral estoppel (Pa5 to 20). The State appealed. On February 21, 1974, the New Jersey Superior Court, Appellate Division, reversed the trial judge's decision (Pa21 to 23). On April 30, 1974, the New Jersey Supreme Court denied certification. *State* v. *Triano*, 65 N.J. 280, 321 A.2d 241 (1974). On October 15, 1974, the Supreme Court of the United States denied a petition for a writ of certiorari. *Triano* v. *New Jersey*, —— U.S. ——, 95 S.Ct. 148.

The remaining count of the indictment was scheduled to be retried on January 24, 1975, before the Honorable Joseph M. Thuring, J.S.C.* On January 21, 1975, petitioner filed the instant petition for a writ of habeas corpus in the United States District Court for the District of New Jersey. On January 23, 1975, the District Court issued an order staying the state court trial pending final

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* On January 20, 1975, a hearing was conducted by order of Judge Thuring to determine whether the State was precluded from substantively introducing at the retrial evidence of bribery and extortion upon which the first jury had exonerated the petitioner. The judge ruled that such evidence would not be barred.

determination of the instant proceedings. By its opinion and order of May 6, 1975, the District Court denied the petition (Pa27 to 50). However, on May 15, 1975, the District Court issued a certificate of probable cause for appeal from that denial (Pa51). Although the District Court refused to continue the stay of the state court proceedings pending appeal (Pa52), the United States Court of Appeals for the Third Circuit reimposed the restraints on the State on June 3, 1975. An appeal to that Court followed. On October 17, 1975, the Circuit Court issued a judgment order, without opinion, affirming the judgment of the District Court denying the writ (Pa53, 54). Petitioner now seeks a Writ of Certiorari. The underlying facts which gave rise to this litigation are not in dispute and may be quickly reviewed.

At petitioner's trial, Abraham Chasnoff, an attorney-at-law of the State of New Jersey, testified that one James Cairns was referred to him through the office of another attorney in Kearny. James Cairns had been charged with two motor vehicle violations by the Hudson County Police Department. Summons No. CA52000 charged the offense of driving while under the influence of alcohol and Summons No. CA53502 charged the offense of failure to obey an officer's signal.

On June 16, 1971, Chasnoff contacted the Hudson County District Court Clerk's Office, entered his appearance as counsel for Cairns and asked for an adjournment of the case from the scheduled June 18, 1971 hearing date. On this date, Chasnoff examined the defendant's copy of the drunk driving summons and discerned that the statute described therein was N.J.S.A. 39:4-50.

Chasnoff further testified that on June 25, he received a message that Joseph Triano, the Deputy Clerk of the Hudson County District Court, had called. Chasnoff tes-

tified that at that time the petitioner indicated that he would schedule the matter for a later date because the officers were angered over the circumstances surrounding Cairns' arrest and thus were reluctant to downgrade the charges. No other action with regard to the case of *State* v. *James Cairns* occurred until November 5, 1971.

On that date, Triano called Chasnoff and arranged to have the latter come to the District Court Clerk's Office to discuss the Cairns case. That afternoon Chasnoff met with Triano. At the meeting, the petitioner told Chasnoff that he had convinced the police officers to downgrade the case from an "A" offense (driving while under the influence) to the lesser offense of "B" (driving while impaired), and that Chasnoff would have to "bag them fifty dollars apiece," so that the officers would not appear in court and the case would be processed as a "B". Chasnoff indicated that he would go along, but needed time to get the money. Chasnoff was to contact Triano when he had the money and to deliver the money to Triano in an envelope. At that time arrangements would be made for a convenient date for disposition.

Subsequent to this conversation, Chasnoff went to the chambers of the Honorable Samuel A. Larner, Assignment Judge of Hudson County, and revealed to the judge the offer made by Triano. Chasnoff was then taken to meet with investigators of the Office of the Hudson County Prosecutor.

On November 15, pursuant to the investigators' instructions, Abraham Chasnoff returned to the Office of the Hudson County Prosecutor and placed a phone call to the petitioner. Attached to the telephone was a recording device that had been installed by the investigators. During this conversation, a hearing date, November 24, 1971, was established. Additionally, the petitioner told Chasnoff

what the fine would probably be and confirmed that the passage of money would occur in the manner previously described, and that the arresting officers would not be in court for the hearing. A tape recording was prepared of this conversation and was subsequently transcribed.

The next encounter between Triano and Chasnoff occurred on November 24, 1971. Chasnoff went to the Hudson County Administration Building where he was fitted with electronic recording devices. Additionally, Chasnoff was given an envelope with a hundred dollar bill in it. This bill had been initialed and the serial number recorded by Prosecutor's Investigator William Flannery on November 23, 1971.

Abraham Chasnoff then proceeded to the petitioner's office. A conversation ensued. In that conversation, Triano informed Chasnoff that everything was in proper order, and that the offense was going to be handled as a "B". Moreover, petitioner revealed his copy of the summons which had a "B". Triano further indicated that he was going to speak with the judge about the case, "show the judge the ticket and tell him what's what and so forth." Abraham Chasnoff then gave the envelope to Joseph Triano; the petitioner held it up to the light, folded it twice and placed it in the top left drawer of the safe. Thereafter, Chasnoff left Triano's office and proceeded to the corridor where he was met by investigators of the Prosecutor's Office; Chasnoff informed the investigators where the petitioner had placed the envelope.

Investigator Flannery testified that he and other investigators of the Prosecutor's Office had entered the Violations Bureau and observed the petitioner and placed him under arrest. A subsequent search of the safe revealed the envelope and the marked money contained therein.

Members of the Prosecutor's Office testified about the monitored conversations between Chasnoff and the petitioner. The jury was permitted to hear relevant portions of the two conversations. The jury was also permitted to see the marked one hundred dollar bill which was received into evidence, as well as the original summonses in both the altered and unaltered form.

Margaret Prendergast, who succeeded the petitioner as Deputy Clerk of the District Court, testified about the procedure of that court. She testified as to the manner in which tickets are entered into the docket book. Mrs. Prendergast further testified that Complaint Number CA52000 appeared in the docket book as a violation of N.J.S.A. 39:4-50. Yet, that same ticket appeared on Judge McCole's calendar for November 24, 1971, as a violation of N.J.S.A. 39:4-50B.

Inspector Edmund L. Burke of the Hudson County Police Department testified on behalf of the State about procedures employed by that department. The Inspector testified that there are four copies to each summons. The defendant receives one; the issuing officer retains one, and the remaining two are turned into the police department and subsequently forwarded to the Court. The Inspector testified that each summons is recorded in a ledger. Edmund Burke further testified that summons CA-52000 issued to James Cairns was recorded as a violation of N.J.S.A. 39:4-50. Moreover, Burke testified that it was the common practice of the officers to indicate N.J. S.A. 39:4-50 when the offense was driving while under the influence and N.J.S.A. 39:4-50B when the offense was driving while impaired.

Norman R. Sierfeld, the officer who issued summons CA52000, testified that he issued the summons to James Cairns for driving while under the influence of intoxicat-

ing liquor. This alleged offense was in violation of N.J. S.A. 39:4-50. Officer Sierfeld further testified that he never discussed the case of *State* v. *Cairns* with the petitioner. Additionally, the witness testified that he never received an offer to reduce the charge against James Cairns.

Ordway Hilton, a handwriting specialist, was called as an expert witness by the State. He testified that he could not conclusively state who added the letter "B" to the statutory designation on the summons. Mr. Hilton testified that "it was not possible because of the nature of the writing of the B and the manner in which B's are formed—."

Judge John McCole of the Hudson County District Court testified as a defense witness. He related that it was not within the scope of the petitioner's duties to alter a traffic summons. The Judge further testified that it was outside Triano's duties to discuss the downgrading of offenses.

Based on the foregoing, the jury acquitted petitioner of extortion and bribery, but was unable to reach agreement on Count III, misconduct in office.

REASONS FOR DENYING CERTIORARI

The constitutional doctrine of collateral estoppel has no application where the state moves all charges against an accused in a single trial and the jury's acquittal on two counts does not resolve in favor of the accused any factual issue necessary to convict on the remaining count upon which the jury could not reach a verdict.

Petitioner was tried on an indictment containing three separate counts. Count I charged that petitioner, as deputy clerk of the Hudson County District Court, had accepted a bribe, present or reward, in violation of N.J.S.A. 2A:93-6. Count II alleged that, under color of his public office, petitioner had accepted a fee or reward not lawfully due him, in violation of N.J.S.A. 2A:105-1. Count III accused petititioner of misconduct in his public office by reason of his actions with regard to a certain case pending in the Hudson County District Court, in violation of N.J.S.A. 2A:85-1. All three counts arose out of a course of events related to the same case then pending in the County District Court (Pa1 to 4). After a 17 day trial, the jury acquitted petitioner on Counts I and II, but was unable to agree on Count III. Petitioner here asserts that the Fifth Amendment guarantee against double jeopardy prohibits the retrial of the remaining count of the indictment because the state is collaterally estopped from instituting that prosecution.* Respondents disagree.

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* Petitioner does not argue, nor on the basis of this record can he argue, that retrial is barred by traditional double jeopardy principles because there was no "manifest necessity" for dismissal of

(Footnote continued on following page)

In *Ashe* v. *Swenson*, 397 U.S. 436 (1970), the United States Supreme Court elevated the doctrine of collateral estoppel to constitutional dimension by incorporating it into the Fifth Amendment's protection against double jeopardy. The facts which gave rise to this decision may be briefly summarized. Six men were playing poker in the basement of the home of one of the players. In the early morning hours, three or four masked men, armed with a shotgun and pistols, burst into the basement and robbed each of the players of money and personal articles. The robbers then fled in a car belonging to one of the player victims. The police located the abandoned stolen car in a field and later that morning arrested three men who were walking nearby. Defendant was arrested separately some distance away. At the trial of defendant for robbing Donald Knight, one of the poker players, the prosecution produced four of the poker players as witnesses. These men testified to the uncontroverted fact that a robbery occurred during the poker game and that three or four masked, armed men relieved each of the players of his valuables. However, the testimony was weak on the critical issue of defendant's identity as one of the robbers, and this became the single contested fact at the trial. Despite an instruction by the trial court that defendant would be guilty of the robbery of Knight if de-

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(Footnote continued from preceding page)

the jury for failure to reach a verdict. See *United States* v. *Perez*, 9 Wheat. 579 (1824); *Downum* v. *United States*, 373 U.S. 734, 736 (1963). The jurors deliberated on the third count for the better part of two days and, after being given every opportunity to reconcile their differences, reported they were hopelessly deadlocked. See *United States* v. *Logan*, 144 U.S. 263 (1892); compare *United States ex rel. Russo* v. *Superior Court*, 483 F.2d 7 (3 Cir. 1973), *cert.* denied 414 U.S. 1023 (1973).

fendant was one of the participants in the crime, whether defendant personally took the articles from Knight or not, the jury returned a verdict of not guilty. Following the acquittal, the defendant was brought to trial for the robbery of one Roberts, another player at the poker game. After defendant's motion to dismiss on the grounds of double jeopardy was denied, the prosecution introduced essentially the same case with the exception that one particularly poor prosecution witness was not recalled at the second trial and the identity testimony was much stronger. The defendant was convicted and after his appeals were rejected in the state courts he brought an action for habeas corpus Ultimately, the Supreme Court granted certiorari to review the merits of defendant's petition.

The Court began its analysis by noting that the Fifth Amendment guarantee against double jeopardy had recently been made applicable to state prosecutions. *Benton* v. *Maryland,* 395 U.S. 784 (1969). Therefore, the question was not one of due process, but rather whether the doctrine of collateral estoppel was part of the Fifth Amendment. The Court concluded that collateral estoppel, as developed and applied in earlier federal cases, would have to be a part of the double jeopardy guarantee in order to protect an individual who has been acquitted from having to again "run the gauntlet." *Id.* at 446. The doctrine provides "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson, supra* at 343. Thus,

> Where a previous judgment of acquittal was based upon a general verdict . . . (the rule of collateral estoppel) requires a court to examine the record of a prior proceeding, taking into account

> the pleadings, evidence, charge and other relevant matter, and conclude *whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. Id.* at 333. (emphasis added)

Applying this rule to the case before it, the *Ashe* Court found that the acquittal in the first trial could only mean that the jury had a reasonable doubt that defendant was one of the robbers. The Court concluded that the prosecution could not hale the defendant before a second jury to attempt to prove the same fact more convincingly. In sum, the Court felt that the prosecution had presented the same case twice, refining its second presentation in light of its first failure, and this was precisely what the constitutional guarantee forbids.

It is respondents' belief that the constitutional doctrine of collateral estoppel, adopted and applied in *Ashe,* has no application to the instant case. Here, the prosecution in good faith sought a complete resolution of all matters arising out of petitioner's alleged criminal conduct with respect to a particular matter then pending in the County District Court. All charges against petitioner were tried together before a single jury and the prosecution stood to win or lose entirely, just as petitioner did. See *State* v. *Gregory,* 66 N.J. 510, 333 A. 2d 257 (1975) (adopting prospectively a rule of compulsory joinder in New Jersey). Through no fault of the prosecution, the jury was unable to agree on the third count of the indictment, although it did acquit petitioner on the first two counts.

This situation differs in a fundamental respect from that considered in *Ashe,* where the prosecution purposely chose to try the defendant for robbery of only one of the

victims. Thus, the defendant in *Ashe* was put into jeopardy at the first trial without hope that he would be able to exonerate himself in one proceeding. When the prosecution failed to convince the first jury that petitioner was present at the robbery scene, it simply selected another of the victims and began a second prosecution which forced defendant to relitigate an essential issue which he had already successfully contested in the first trial. It was this harassing and oppressive behavior by the prosecution, whereby it could effectively practice its presentation and then reprosecute more efficiently, that was condemned by the *Ashe* Court. None of the factors which prompted the disproval in *Ashe* are present here. Nor has the United States Supreme Court ever applied the constitutional rule of collateral estoppel to cases such as the instant one. See *Turner* v. *Arkansas,* 407 U.S. 366 (1972); *Harris* v. *Washington,* 404 U.S. 55 (1971); *Simpson* v. *Florida,* 403 U.S. 384 (1971). Thus, respondents submit that the embodiment of collateral estoppel in the Fifth Amendment guarantee against double jeopardy does not require application of that doctrine here. However, to further evidence the strength and logic of their position, respondents would briefly review the background, purpose and motivation for the *Ashe* decision.

The policies and purposes behind the traditional double jeopardy guarantee are well defined. See, *e.g., United States* v. *Jorn,* 400 U.S. 470, 479-480 (1971); *Green* v. *United States,* 355 U.S. 184 (1957). Essentially, the State, with all its power and resources, should not be permitted to make several attempts to convict a defendant for an alleged criminal act. Successive prosecutions cause the defendant expense, embarrassment, ordeal, anxiety and the insecurity of knowing that the end of one trial may not be the end of his troubles. *Green* v. *United States, supra* at 187-190; Comment, "Criminal Procedure-Double Jeop-

ardy-Trial Courts Granted Broad Discretion to Determine 'Manifest Necessity' for Mistrial," 26 *Rut.L.Rev.* 683, 684 (1973). Moreover, the state ought not to be allowed to retry a defendant with a view toward finding the right set of facts which will produce a conviction. *North Carolina* v. *Pearce,* 395 U.S. 711, 734 (1969) (Justice Douglas, concurring); "Collateral Estoppel Is Constitutionally Required In Criminal Cases Because It Is Embodied In The Fifth Amendment Double Jeopardy Clause—*Ashe* v. *Swenson,*" 69 *Mich.L.Rev.* 762, 767 (1971). Nor should the state be free to employ the criminal process as a means of harassment of an individual. *North Carolina* v. *Pearce, supra* at 733 (Justice Douglas, concurring); Note, *supra,* 69 *Mich.L.Rev.* at 767.

At common law and during the early statutory development of the criminal law, the double jeopardy principle provided an accused with adequate protection against the abuses outlined above. See Note, *supra,* 69 *Mich.L. Rev.*; Comment, "Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee," 65 *Yale L.J.* 339, 341-343 (1956). The evolution of the criminal law, however, stripped the doctrine of much of its utility. The increased number of statutes under which a single criminal act may be prosecuted opened the defendant to multiple prosecutions for an essentially unitary criminal episode. In light of the differing shades of criminality covered in these statutes, the "same evidence" test was of little aid to the harried defendant. See Note, "Double Jeopardy and the Multiple Count Indictment," 57 *Yale L.J.* 132, 133 (1947). This development, among others, exposed the guarantee against double jeopardy as a doctrine of limited protective value.

Recognizing the need to breathe new vitality into a collapsing principle, the federal courts (see *e.g., Scalfon* v.

United States, 332 U.S. 575 (1948)), and many other jurisdictions, including New Jersey (see *e.g., State* v. *Cormier,* 46 N.J. 494, 218 A.2d 138 (1966)), applied collateral estoppel to criminal cases. And, it is clear the doctrine is well-suited to accomplish its purpose.

The basic policy considerations of collateral estoppel, when it is applied to criminal cases, are virtually identical to the objectives of the traditional double jeopardy rule barring reprosecutions after acquittal. It is intended to protect an individual from harassment, embarrassment, anxiety, etc. See Meyers and Yarbrough, "Bix Vexari: New Trials and Successive Prosecutions," 74 *Harv.L.Rev.* 1, 32-33 (1960). The principle, while identical in purpose, applies to situations not covered by the traditional double jeopardy guarantee, but rife with the very abuses which the latter doctrine was meant to eliminate.

It was from this background and the then recent holding of *Benton* v. *Maryland, supra,* that the *Ashe* rule grew. 397 U.S. 443, n.10. And, viewed in this context it is difficult to see how it can be said collateral estoppel as a constitutional doctrine can apply to the case at bar. Under these circumstances in no sense is there any harassment or oppression or multiple prosecution which the *Ashe* Court found repugnant. On the contrary, the State, in good faith, prosecuted its charges in a single trial. A retrial would entail no more embarrassment, expense or ordeal for the defendant than would exist on a retrial on a single count indictment where the jury disagrees—a thoroughly proper procedure. *United States* v. *Perez,* 9 Wheat. 579 (1824); see *Downum* v. *United States,* 372 U.S. 734, 736 (1963). Yet, the State's vital interest in enforcing the criminal laws would be severely impaired by barring reprosecution.

These compelling policy considerations prohibit the application of collateral estoppel to the instant case without regard to the question whether the jury acted consistently in acquitting petitioner of the first two counts and failing to agree on a verdict on the third count. However, if it is assumed that petitioner is correct in his position that the jury inconsistently failed to acquit him on the remaining count, it is at once apparent that collateral estoppel cannot be rationally or practically applied.

As noted above, *Ashe* requires a court to examine the record of the prior proceeding and assess the evidence, instructions and other relevant material in order to decide "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* at 443. Clearly, application of this standard cannot lead to a determination where jurors, or at least some of them, have been inconsistent in their verdicts. This inconsistency must be considered as part of the practical framework of the proceedings. The most that can be said in such cases is that the verdict shows that either in the acquittal or the disagreement the jury did not speak its real conclusions. See *Dunn* v. *United States*, 284 U.S. 390, 394 (1932); *Steckler* v. *United States*, 7 F. 2d 59, 60 (2 Cir. 1925). There is no reason to conclude that the misstatement is to be found in the deadlock rather than in the acquittal. A determination as to what was resolved in these circumstances would involve pure speculation, a process not embodied in the *Ashe* test for determining what was ultimately determined in the first trial. Even if collateral estoppel applies in theory to this proceeding, in practice it can never bar retrial. Thus, the very inconsistency, which petitioner argues bars a retrial in this case, in fact, compels a contrary conclusion.

Respondents acknowledge that the foregoing analysis appears to have been implicitly disapproved in *United States ex rel. Rogers* v. *LaVallee*, 517 F.2d 1330 (2 Cir. 1975), a case upon which petitioner places heavy reliance. In *Rogers*, the defendant had been charged in a New York State prosecution with kidnapping. Under the New York statutory scheme, kidnapping is classified according to degree and petitioner was alternatively charged in two of the counts with various forms of first degree kidnapping. At the trial, the court erroneously instructed the jury that it should determine whether defendant was guilty under each count of the lesser offense of simple abduction, an offense included within all types of first degree kidnapping. The jury returned verdicts of not guilty as to first degree kidnapping and simple abduction under one of the counts, but was unable to reach any verdict under the remaining kidnapping charge. The trial court declared a mistrial on that count and defendant was subsequently retried and convicted.

After his petition for habeas corpus was denied by the United States District Court, Rogers sought review in the Second Circuit Court of Appeals. The majority of the three judge panel ruled that the verdicts of acquittal at the first trial determined that defendant had not committed even simple abduction. Therefore, the majority concluded, the state could not retry defendant on the remaining kidnapping charge which included the component of simple abduction.

Aside from the propriety of its result, *Rogers* is clearly distinguishable from the present matter. The majority there emphasized that the trial court had created the incongruity by its plainly erroneous instruction and its failure to recognize the contradiction in the jury's verdicts. More importantly, the prosecution was deemed to be

"equally at fault" by not objecting to the instructions or to the form of the verdict as rendered. In addition, the majority pointed out that the jury had expressly declared that defendant was not guilty of simple abduction. For these reasons, the Court felt that the policy of collateral estoppel prohibited the retrial. In the instant matter, there is no indication of prosecutorial error. Nor did the jury's verdict explicitly decide against the State any factual issue necessary to conviction on the remaining count. Thus, petitioner may not draw support from *Rogers*.

Even if *Rogers* is not distinguishable in principle from the present matter, respondents submit that it should not be followed. As Judge Lumbard pointed out in his dissent, the defendant could not argue that the jury at the first trial had acquitted him of the necessarily included offense when "in virtually the same breath the foreman stated that the jury was deadlocked not only on simple abduction under count four, but on the primary charge under count four of kidnapping resulting in death." *Id.* at 1336. As demonstrated above, such a contradiction renders impossible any meaningful application of the *Ashe* rule.

Petitioner here contends that this Court should grant *certiorari* to resolve an alleged conflict between federal circuits. He asserts that the Third Circuit has now adopted a position on collateral estoppel which is directly opposed to the Second Circuit's decision in *Rogers*. This assertion is completely unfounded. The Third Circuit wrote no opinion in this matter but simply issued a judgment order which affirmed the judgment of the District Court. It is inconceivable that by its action the Third Circuit intended to even consider a significant issue of constitutional law. This is especially clear in light of the fact that the District Court decided the matter on

narrow grounds without reference to these issues. Thus, there is no conflict among the circuit courts on this question.

Notwithstanding that the foregoing discussion touches upon interesting issues of constitutional dimension, the instant matter simply does not require their determination. Rather, this case is easily resolved on a purely factual basis which involves nothing more than the application of well-established and undisputed principles of law. An examination of the pleadings and evidence adduced at the trial demonstrates convincingly that the jury "could have grounded its verdict upon an issue other than that which the [petitioner] seeks to foreclose from consideration." *Ashe* v. *Swenson, supra* at 443.

The first count of Indictment No. 326-71 charged bribery, under N.J.S.A. 2A:93-6, in that the petitioner, the Deputy Clerk of the Criminal Division of the District Court, on November 24, 1971, did "willfully, knowingly, unlawfully and corruptly receive approximately $100 in cash as a *bribe, present or reward*" in return for obtaining an improper disposition of a pending criminal complaint. (emphasis added).

The second count charged extortion, under N.J.S.A. 2A:105-1, in that the petitioner on November 24, 1971, did "willfully, knowingly, unlawfully and by color of his office . . . receive and take from Abraham J. Chasnoff . . . a *fee and reward* in the amount of approximately One Hundred Dollars ($100.00) in cash, the same not allowed by law to the same Joseph A. Triano for performing his duties as Deputy Clerk of the Criminal Division of the Hudson County District Court." (emphasis added).

At the trial, the key prosecution witness, Abraham Chasnoff, Esq., testified that petitioner had indicated to

him that a traffic summons pending against Mr. Chasnoffs' client could be modified to state a lesser charge. However, according to Chasnoff, petitioner had related that the two police officers who had issued the summons would not acquiesce in the proposed downgrade unless petitioner could "bag them fifty dollars apiece." After reporting this incident to the appropriate authorities, Mr. Chasnoff obtained a marked $100 bill from the Hudson County Prosecutor's Office. After placing the bill in an envelope, pursuant to petitioner's instructions, Mr. Chasnoff brought that envelope to petitioner's office where he conversed with petitioner about the summons and then handed the envelope to him. Petitioner took the envelope, held it up to the light, folded it and placed it in the safe in his office. After Chasnoff left petitioner, he met with investigators from the Prosecutor's Office who entered petitioner's office, arrested him and removed the envelope from the safe.

The above summary demonstrates that the prosecution's own case had introduced an uncertainty as to whether petitioner had received the $100 bill for his own use and benefit or whether he had acted as the conduit for the two arresting officers. Since the evidence of petitioner's actual receipt of the money was overwhelming, the question whether he was to be the beneficiary became critical in light of the trial court's instructions to the jury. The trial court told the jury that, to find petitioner guilty of bribery under Count I, petitioner must have received an "undue reward" and must have acted with an intent to acquire "an unlawful personal benefit or advantage."*

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* It is noted that, as a matter of state law, personal gain is not a requisite element of bribery. See *State* v. *Begyn*, 34 N.J. 35, 167 A.2d 161 (1961). However, this error could only have increased the burden on the prosecution and provided an undue advantage to petitioner. Understandably, petitioner has never objected to this instruction which is so pivotal to the present discussion.

Similarly, in instructing on the elements of extortion under Count II, the trial court advised the jury that petitioner must have taken a fee or reward, not allowed by law, for performing the duties of his office. Further, the court repeated that petitioner must have taken money "not due to him" and continued that this undue taking occurs when an officer "receives a fee or reward to which he is not legally entitled by reason of or in connection with his official duties."

Clearly, the effect of these instructions was to convince the jury that petitioner could not be guilty under Count I or Count II unless he intended to, and did, accept the $100 bill for his own personal gain. Indeed, the District Court below explicitly agreed with this analysis (Pa44 to 48). Thus, the jury could well have acquitted petitioner on these counts precisely because it was unable to find this "personal gain" element beyond a reasonable doubt. Not by coincidence, the trial court's instruction on the remaining count was expressly to the contrary as regards petitioner's benefit and gain.

Count III charges that, between November 5 and 24, 1971, petitioner "wilfully, maliciously and corruptly violated his duty to the public" to fairly and justly process all complaints and summonses, "and did misperform and misconduct duties of his said office, as the same related to the case of State of New Jersey v. James M. Cairns . . . by undertaking to . . . dispose of . . . said case in an unfair, partial and unjust manner" by committing several acts of misconduct. The count continues by listing three alleged acts of misconduct in three subparagraphs. The first of these paragraphs alleges that petitioner represented to Abraham Chasnoff that petitioner would obtain the consent of the officers who issued the summons to a disposition of the case favorable to Mr. Chasoff's client

if Chasnoff would supply a sum of money to petitioner who would in turn transmit the money to the officers. The second paragraph asserts that petitioner improperly amended the summons to reflect a violation of N.J.S.A. 39:4-50B, a lesser offense than that charged originally in the summons, to wit, a violation of N.J.S.A. 39:4-50. The third paragraph claims that petitioner received $100 from Mr. Chasnoff in exchange for petitioner's undertaking to influence the favorable disposition of the pending summons as aforesaid.

In its instructions on Count III, the trial court plainly excluded the element of personal gain from the offense charged.

> To prove criminal intent—that is, bad faith or evil motive or dishonesty, it is not necessary however for the state to adduce proofs from which it could be inferred that the defendant intended to profit or otherwise benefit from the acts alleged to have been done by the defendant or omitted by the defendant.

This instruction was repeated when the jury requested to be reinstructed on the law governing Count III. Beyond cavil, the jury must have understood that, unlike the principles governing Counts I and II, the personal gain or advantage of petitioner formed no part of the offense alleged in Count III. Again, the District Court reached the same conclusion below (Pa48).

Respondents respectfully submit that the above analysis resolves any question regarding the propriety of petitioner's retrial under Count III. The jury could, and most probably did, conclude that there was a reasonable doubt whether petitioner had accepted the $100 bill for himself, rather than for the police officers. Therefore,

the jury acquitted petitioner of Counts I and II. However, the jury was not required to find this same element of personal gain in order to convict petitioner of misconduct in office under Count III. Therefore, the jury's inability to reach a verdict on that charge was due to its disagreement on some other point not readily apparent. In any event, the prosecution at the retrial will not be required to prove that petitioner acted for personal gain in order to convict him of misconduct. See *State* v. *Begyn, supra.* Consequently, petitioner will not be haled before a second jury and forced to relitigate a critical issue on which he has already defended successfully. *Ashe* v. *Swenson, supra.* In short, collateral estoppel presents no obstacle to the retrial of Count III.

Finally, respondents would comment that petitioner appears to be asserting that, regardless whether the remaining count of the indictment may be retried, this Court should decide whether certain evidence will be admissible on the retrial. Although petitioner's contentions in this regard are anything but clear, respondents adamantly oppose any consideration of potential evidentiary rulings and admissions at the much delayed retrial. The question of what evidence will be admitted at a state trial is one which a federal court must be extremely reluctant to take up prior to the completion of the state prosecution. See *Helfant* v. *Kugler,* 95 S.Ct. 1524 (1975); *Stefanelli* v. *Minard,* 342 U.S. 117 (1951). Further, there has been no exhaustion of state remedies on this issue, as contrasted to the issue of the propriety of the retrial itself. Thus, the state judiciary has not had a full opportunity to consider this question. For that reason, petitioner must demonstrate an "extraordinary circumstance" in order to have this Court intervene. *Moore* v. *DeYoung,* 515 F.2d 437 (3 Cir. 1975). However, it is obvious that no such circumstance exists to now justify review of the

expected evidentiary rulings at the retrial. Once it is determined, as it must be, that the retrial itself is not barred, petitioner will suffer no irreparable injury by being forced to contest the alleged evidence problems during that prosecution. See *Younger* v. *Harris,* 401 U.S. 37 (1971). While it will not cause petitioner undue hardship to timely present his objections to the state courts, intervention at this juncture would irrevocably damage the sensitive relations between this Court and the state judiciary. Petitioner must not be permitted to pervert the Great Writ "into a pretrial-motion forum for state prisoners." *Braden* v. *30th Judicial Circuit Court of Kentucky,* 410 U.S. 484, 508 (1973) (Rehnquist, J., dissenting).

In any event, collateral estoppel as an element of the guarantee against double jeopardy does not serve to bar the mere introduction of evidence at subsequent trials. Rather, as discussed above, collateral estoppel was incorporated into the Fifth Amendment by *Ashe* in order to supplement and bolster the protections afforded by the double jeopardy clause. That clause is intended to prevent vexatious and unfair retrials. It is not concerned with the evidence to be introduced, once it is found that the retrial will be allowed. See, *e.g., Ashe* v. *Swenson, supra* at 446; *Sealfon* v. *United States, supra; Yates* v. *United States,* 354 U.S. 298 (1957); *United States* v. *Kills Plenty,* 466 F.2d 240 (8 Cir. 1972), *cert.* den. 410 U.S. 916 (1973); *United States* v. *Castro-Castro,* 464 F.2d 336 (9 Cir. 1972), *cert.* den. 410 U.S. 916 (1973); *United States* v. *Pappas,* 445 F.2d 1194 (3 Cir. 1971), *cert.* den. 404 US. 984 (1971); *United States* v. *Nash,* 447 F.2d 1382 (4 Cir. 1971); *United States* v. *Fusco,* 427 F.2d 361 (7 Cir. 1970); but see *Phillips* v. *United States,* 518 F.2d 108 (4 Cir. 1975). One Circuit Court of Appeals has ruled flatly that collateral estoppel does prohibit reintroduction of evidence at a retrial. *Wingate* v. *Wainwright,* 464 F.2d

209 (5 Cir. 1972). However, that Court has recognized that its ruling in *Wingate* "significantly expanded the *Ashe* holding." *Blackburn* v. *Cross*, 510 F.2d 1014, 1017 (5 Cir. 1975). Thus, the *Wingate* interpretation of collateral estoppel is admittedly not justified by the ruling in *Ashe* but is a policy decision independently reached by the Fifth Circuit. See also *McDonald* v. *Wainwright*, 493 F.2d 204 (5 Cir. 1974). At least one federal court has specifically disapproved that decision. *United States* v. *Addington*, 471 F.2d 560, 567, n.5 (10 Cir. 1973).

The above authority demonstrates that the majority of federal courts considering the question have ruled that collateral estoppel as a constitutional precept is not a rule of evidence. This view comports fully with the historical and conceptual basis for the embodiment of collateral estoppel in the guarantee against double jeopardy. Thus, petitioner may not avail himself of the doctrine to prevent the state from using again the evidence introduced at the prior trial. Indeed, petitioner has made no effort to demonstrate which evidence would have been precluded even if his view of collateral estoppel were correct. Respondents would conclude by simply noting that the evidence at the retrial will not be introduced for the purpose of showing that petitioner accepted the $100 bill for his own gain or benefit. Rather, the evidence of petitioner's receipt of the money is directly relevant and material to the remaining count of misconduct. Clearly under any theory of collateral estoppel, there would be no bar to the state employing this evidence for that purpose at the second trial. *United States* v. *Pappas, supra.*

It has long been the practice of this Court not to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. *Burton* v. *United States*, 196 U.S. 283, 295 (1905); *Liverpool, N.Y. & P.S.S. Co.* v.

Emigration Commissioners, 113 U.S. 33, 39 (1885); *Ashwander* v. *TVA,* 297 U.S. 288, 346-348 (1936) (Brandeis, J., Concurring). From the foregoing it is manifestly clear that no constitutional issue need be decided in this matter. Indeed this case involves nothing more than the routine application of well-established principles of law to an unremarkable factual setting. Hence there is no cause for review by this Court.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the writ of *certiorari* should be denied.

Respectfully submitted,

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